In The

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1693

STANLEY BLACKLEDGE, Warden,

Central Prison, and

STATE OF NORTH CAROLINA,

Petitioners

v.

GARY DARRELL ALLISON,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RUFUS L. EDMISTEN
Attorney General

RICHARD N. LEAGUE
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7188

ATTORNEYS FOR PETITONERS

INDEX

APPENDICES

TABLE OF CASES

TABLE OF STATUTES AND RULES

In The

Supreme Court of the United States

OCTOBER TERM 1975

No.

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,
Petitioners

v.

GARY DARRELL ALLISON,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Stanley Blackledge and the State of North Carolina, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Gary Darrell Allison v. Stanley Blackledge, Warden, Central Prison, and the State of North Carolina*, No. 75-1738, filed April 13, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals styled and filed as above is not yet reported but is printed as Appendix E to this petition (pp 23, *post*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC 1254 (1) within ninety days of April 13, 1976, the date of entry of the order to be reviewed.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT PROPERLY ACCEPTED A STATE COURT FINDING ON THE VOLUNTARINESS OF ALLISON'S GUILTY PLEA UNDER *TOWNSEND V. SAIN*, 372 US 293 (1963) AND THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S EXERCISE OF DISCRETION IN THIS REGARD.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment, the Fourteenth Amendment, 28 USC 2254 and 28 USC 2255.

STATEMENT OF THE CASE

On January 24, 1972 in the Superior Court of Alamance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). He was represented by counsel, Glenn Pickard, Esquire, at this time. Before Judge Blount accepted this plea, he asked Allison some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions are Appendix A to this petition (pp. 10, *post*), and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison, under

oath, acknowledged among other things that he was guilty and that he understood he could be imprisoned from 10 years to life as a result of his plea, and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. On the basis of the overall inquiry findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty years. He did not appeal.

On or about February 15, 1973, after having exhausted state remedies, Allison applied for a writ of habeas corpus from the United States District Court for the Middle District of North Carolina pursuant to 28 USC 2254 alleging that his guilty plea thirteen months earlier to the charge of attempted safe robbery was a result of the following episode:

> "The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel."

See Appendix B (pp. 14, *post*).

In reviewing Allison's application, Honorable Eugene A. Gordon, Judge Presiding, found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea, and impliedly accepted it in lieu of further hearing. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation about a sentence. Therefore, he dismissed the application

without evidentiary hearing. This order appears as Appendix C (pp. 18, *post*). Allison sought a reconsideration, whereupon Magistrate Herman A. Smith then characterized the allegation as one of "an unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit by the witness he had originally mentioned in support of this claim. Instead of doing this, on or about May 13, 1974, Allison sent a letter saying that his witness was unable to get his statement notarized. On or about May 17, 1974, he followed this saying that his mother had written him that the papers had been notarized but were then torn up by the notary. This was interpreted as suggesting state interference with his right to access to the courts by the District Court, for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness with that statement to include a recitation of his attempts to get his paper notarized. Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the Court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release". On August 16, 1974, Judge Gordon again dismissed the application. This order appears as Appendix D (pp. 20, *post*). Allison then obtained and sent an unsworn statement purportedly made and signed by his co-defendant and witnessed by three persons without designation, again seeking reconsideration of the judge's second order. Nothing was said about state interference with his access to the courts in this statement, and he did not send with it an affidavit from his mother. Reconsideration was declined by Judge Gordon and Allison appealed.

On April 13, 1976, after briefing and oral argument, the United States Court of Appeals for the Fourth Circuit reversed the District Court in a decision in which Honorable John A. Field, Jr., Circuit Judge, concurred but criticized the precedents in the Circuit necessitating his concurrence and the course of

decision in the Circuit on this type of case. A motion to rehear *en banc* was made within the Court but failed for a want of a majority. This opinion appears as Appendix E (pp. 23, *post*). Writing for the majority, Honorable Harrison Winter, Circuit Judge, held that Allison was not bound by his at-trial statement that he had not been promised anything for his plea because "he had advanced a reasonable explanation for his inconsistent allegations", *ie.* he had been instructed to answer in the way he did by his lawyer. The majority also held improper the District Court's action in requiring that Allison document his claim with affidavits. On April 21, 1976, a stay of mandate for purpose of seeking certiorari in this Honorable Court was granted on the condition that the petition be filed within thirty days.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT IN THE CIRCUITS OVER THE EFFECT TO BE GIVEN RULE 11 AND *BOYKIN V. ALABAMA*, 395 US 238 (1969) TESTIMONY BY AN ACCUSED IN A LATER HABEAS ACTION CONCERNING ALLEGED BROKEN PLEA BARGAINS. THE FOURTH CIRCUIT'S RULE ADVERSELY AFFECTS A SUBSTANTIAL NUMBER OF NORTH CAROLINA CONVICTIONS AND IS IN CONFLICT WITH *MACHRIBRODA V. UNITED STATES*, 368 US 487 1962; *TOWNSEND V. SAIN*, 372 US 293 (1963); AND *FONTANE V. UNITED STATES*, 411 US 213 (1973).

In *Machribroda v. United States*, 368 US 487 (1961) and *Fontane v. United States*, 411 US 213 (1972), this Honorable Court adopted a case-by-case approach to allegations by prisoners that their guilty pleas were the result of unkept promises by government personnel. In the first of these cases, the Court characterized the claim as "marginal" and "close to

the line" but held that because the allegations were specific and detailed and were not belied by the files and records of the case, a further hearing was required by the language of 28 USC 2255. In the latter case, the Court noted as a general proposition that an accused would not be allowed to repudiate his statements at the time of plea, but again because petitioner's claim related in part to his mental competency, and he provided corroborative material, this Honorable Court reversed the denial of a hearing to him. In the intervening years between *Machribroda* and *Fontane*, the first of these decisions produced several divergent lines of authority within the circuits. The Third, Fifth, Sixth and Tenth Circuits generally held that if a Rule 11 inquiry was made at trial and the defendant stated at that time no promises were made to him for his plea, then the files and records are conclusive on the matter under 28 USC 2255 and a habeas corpus hearing is not required, *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964). On the other hand, the First, Second and Ninth Circuits generally held that such Rule 11 statements have evidential value at any later hearing but do not make the files and records conclusive on the matter and therefore these Circuits require a hearing, *United States v. McCarthy*, 433 F2d 591 (1 Cir 1970); *Trotter v. United States*, 352 F2d 419 (2 Cir 1969); *Reed v. United States*, 441 F2d 569 (9 Cir 1971). Three of the remaining circuits apparently opted for a middle course which might be described in terms of a "defeasible conclusive" approach in which a higher threshold for inquiry has been required. However, this requirement of a higher threshold in the Fourth Circuit is an illusory one rather than one of substance.

The Fourth Circuit first dealt with the issue of habeas hearings for allegations concerning broken plea bargains in *Walters v. Harris*, 460 F2d 988 (4 Cir 1972), which decision placed it with the "evidential—not conclusive" group. In that case, the

Court remanded Walters' case for hearing despite a detailed Rule 11 inquiry which had revealed no promises. Later the Fourth Circuit appeared to modify *Walters* in *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) and to move into the middle group. In that case, on the basis of much less of a Rule 11 inquiry than had occurred in *Walters*, the Court held that the allegations of a plea bargain were insufficient to require a hearing, and announced the Circuit's rule to be:

> ". . . that the accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so. Stated otherwise . . . a defendant should not be heard to controvert his Rule 11 statements in a subsequent §2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statements."

However, in *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1975), cert. den. ..... US ..... (1976), the Fourth Circuit held that an allegation by a prisoner that he was told to answer untruthfully by his lawyer in order to assure acceptance of the plea bargain was a valid reason to go behind the at-trial statements and would require a hearing by district courts confronted with such allegations. Since this generally accompanies an allegation of a broken plea bargain, *ie.* is a stock corollary to it, it adds nothing to *Walters v. Harris, supra*, and in substance, if not form, the Fourth Circuit remains where it was—in the "evidential—not conclusive" group.

Whether or not the above is a proper disposition for §2255 habeas cases, this same view has been erroneously carried over to state cases in the Fourth Circuit in spite of the higher "conclusive" standard applicable to federal habeas review, *cf.* 28 USC §2254, §2255, and in spite of this Court's and Congress' authorization to the district court to accept state court factual findings, *Townsend v. Sain*, 372 US 293 (1963); 28 USC

§ 2254. Therefore, the fact that the Fourth Circuit is on the wrong side of the split in authority in the circuits has led to a situation where all 116,000 guilty pleas rendered in North Carolina from 1967 through 1973 are subject to collateral attack on a new basis, as well as a good part of those 50,000 plus guilty pleas entered from 1974 to the present. This is disheartening because North Carolina began dealing with the problem of plea bargaining by means of a pre-plea, in-court, interrogation under oath well before being required to by *Boykin v. Alabama*, 395 US 238 (1969). More importantly it is extremely disruptive because the sentences for the worst of the crimes committed during the above periods have not yet been served, and even those which have been served retain continued viability for habeas review purposes in the contexts of use for later impeachment, *Loper v. Beto*, 405 US 473 (1972); sentencing, *United States v. Tucker*, 404 US 443 (1972); and other "collateral consequences", *Carafas v. Lavallee*, 391 US 234 (1968). Therefore, it cannot be questioned that the Fourth Circuit's decision has substantial impact in North Carolina.

This Honorable Court has held in *Fontane v. United States*, *supra*, that compliance with Rule 11 "like any procedural mechanism . . . is neither always perfect nor uniformly invulnerable to subsequent challenge . . .". However, if the case law in the Fourth Circuit stands, then it never is, and paradoxically, compliance with Rule 11 and with *Boykin v. Alabama*, *supra*, is worthwhile only where is was unnecessary in the first place.

CONCLUSION

It is respectfully submitted that because of the above, this case is of sufficient importance for the court to exercise its jurisdiction and issue a Writ of Certiorari to review the decision of the United States Court of Appeals, either to summarily reverse it, or to set the matter for briefing and argument.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Richard N. League
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7188

APPENDIX A

STATE OF NORTH CAROLINA
County of Alamance
STATE OF NORTH CAROLINA
vs.
Gary Darrell Allison

File #71CrS 15073
Film # .....
In The General Court of Justice
Superior Court Division

TRANSCRIPT OF PLEA

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer: Yes

2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer: No

3. Do you understand that you are charged with the felony of Attempted Safe Cracking? Answer: Yes

4. Has the charge been explained to you, and are you ready for trial? Answer Yes

5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Anwer: Yes

6. How do you plead to the charge of Attempted Safe Cracking—Guilty, not Guilty, or nolo contendere?
Answer: Guilty

7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer: Yes

   (b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer: .....

8. Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum of 10 years to life? Answer: Yes

9. Have you had time to subpoena witnesses wanted by you? Answer: Yes

10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer: Yes

11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?
Answer: No

12. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty? Answer: Yes

13. Do you have any questions or any statement to make about what I have just said to you? Answer: No

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

Gary Darrell Allison
Defendant

Sworn to and subscribed before me this 24th day of January, 1972.

Catherine Sykes, Ass't.
Clerk Superior Court

AOC-L Form 158
Rev. 10/69

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, Gary Darrell Allison, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, M. Glenn Pickard, who was (court appointed); and the defendant through his attorney, in open Court, plead (guilty) to Attempted Safe Cracking as charged in the (warrant) (bill of indictment), of Breaking & Entering, Safe Burglary & Possession of Burglary Tools and in open Court, under oath further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;

2. He is and has been fully advised of the maximum punishment for said offense (s) charged, and for the offense (s) to which he pleads guilty;

3. He is guilty of the offense (s) to which he pleads guilty;

4. He authorizes his attorney to enter a plea of guilty to said charge (s);

5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;

6. He is ready for trial;

7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty, by the defendant is freely, understandingly and voluntarily

made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of guilty be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This 24th day of January, 1972.

Marvin Blount Jr.
Judge Presiding

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GARY DARRELL ALLISON, Petitioner,	)	
v.	)	PETITION FOR WRIT
	)	OF
DR. STANLEY BLACKLEDGE, Warden	)	HABEAS CORPUS
Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondent.	)	No. C-71-G-73

* * * * * * *

13. State concisely every ground on which you base your allegation that you are being held in custody unlawfully and in violation of the Constitution or laws of the United States:

(a) Petitioner contends that his guilty plea was induced by an unkept promise, and therefore was not the free and willing choice of the petitioner, and should be set aside by this Court. An unkept bargain which has induced a guilty plea is grounds for relief. SANTOBELLO v. NEW YORK, 404 U.S. 257, 267 (1971).

* * * * * * *

14. State fully and concisely, and in the same order all available evidence, documentary or otherwise, which you claim will support each of the grounds set out in item (13):

(a) The petitioner was charged with and brought to trial on the charges of safe robbery, and two (2) counts of breaking, entering and larceny and possession of burglary tools.

The petitioner was led to believe and did believe, by Mr. Pickard, that he Mr. N. Glenn Pickard had talked the case over with the Solicitor and the Judge, and that if the petitioner

would plea [*sic*] guilty, that he would only get a 10 year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel.

That the petitioner had entered pleas of not guilty and the case was called and a recess was called, and it was at this recess, that the petitioner agreed to plead guilty, because he was told that he had to do so, because the jury was going to find him guilty because his co-defendant was going to plead guilty.

The petitioner believing that he was only going to get a ten year active sentence, allowed himself to be pled guilty to the charge of attempted safe robbery, and was shocked by the Court with a 17-21 year sentence. In MACHRIBRODA v. UNITED STATES, 368 U.S. 487, [*sic*] it was held that a guilty plea induced by a promise was involuntary.

The petitioner was promised by his Attorney, who had consulted presumably with the Judge and Solicitor, that he was only going to get a ten year sentence, and therefore because of this unkept bargain, he is entitled to relief in this Court. An assurance by another that Petitioner would receive a particular sentence therefore since the trial Judge was the only authority as to the length of sentence, the unkept bargain which induced the guilty plea would invalidate the guilty plea. SANTOBELLO v. NEW YORK, SUPRA. [*sic*]

The petitioner is aware of the fact that he was questioned by the trial Judge prior to sentencing, but as he thought he was only going to get ten years, and had been instructed to answer the questions, so that the Court would accept the guilty plea, this fact does not preclude him from raising this matter especially since he was not given the promised sentence by the Court.

It is clear that the United States Supreme Court specifically approved of plea bargaining in SANTOBELLO, SUPRA, and it is equally clear that plea bargaining, when same has been held as in this matter, should appear upon the face of the record. WALTERS v. HARRIS, 460 F. 2d 988 (1972 4th Cir.)

It is clear that the petitioner is entitled to relief in this Court, if in fact, he plead guilty, to the charge of attempted safe robbery, upon the belief that he was only going to receive a ten year sentence. The fact that the Judge, said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence.

It was as said in United States v. Williams, 407 F. 2d 940, 949 n. 13 (4th Cir. 1969):

> ". . . If the Judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, . . . (the defendant) would no more challenge the statement in open court than he would challenge a clergyman's sermon from the pulpit."

Because of the above, it is clear that the response given in Court by this petitioner cannot be used as conclusive proof that the guilty pleas [*sic*] was not induced by a promise that was not kept as contended by the petitioner in this cause, See: REED v. UNITED STATES, 441 F. 2d 569 (9th Cir. 1971); UNITED STATES v. SIMPSON, 436 F. 2d 162 (D.C. Cir. 1970); UNITED STATES v. McCARTHY, 433 F. 2d 591 (1st Cir. 1970); TROTTER v. UNITED STATES, 359 F. 2d 419 (2d Cir. 1966).

WALTERS v. HARRIS, Supra. Pamphlet decision Pages 11-12 says:

> ". . . Surely in the future the United States Supreme Court's approval of plea bargaining, Santobello, Supra, will dispel the doubt about the validity of plea bargaining that has caused plea bargains traditionally to be shrouded in secrecy. "We reiterate what we have said before: That when plea bargaining occurs it ought to be spread on the record and publicly disclosed. 'RAINES, Supra, at 530. (I) f (a plea) was induced by promises, the essence of those promises must in some way be made known' Santobello, Supra at ....."

The guilty plea to attempted safe robbery and sentence of 17 to 21 years is invalidated and made involuntary by the unkept promises in this cause of only a ten year maximum sentence, and should be set aside and vacated by this Court. 6th, 6th [*sic*] and 14th Amendments to the Constitution.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON,)
Petitioner,)
v.)
)
DR. STANLEY BLACKLEDGE,) C-71-G-73
Warden, Central Prison,)
Raleigh, N. C. and STATE)
OF NORTH CAROLINA,)
Respondents.)

MEMORANDUM OPINION AND ORDER

GORDON, Chief Judge

Petitioner is a state prisoner seeking habeas corpus relief. He has been allowed to proceed as a pauper.

Petitioner alleges that his plea of guilty was invalid, that he was not informed of his right to appeal and he has been denied a post-conviction hearing.

The respondents' motion to dismiss will be granted.

Petitioner alleges that counsel "presumably" talked with the Court and solicitor and that counsel told him if he entered a plea of guilty he would get but ten years. Petitioner was sentenced to 17 to 21 years for safe robbery. Petitioner does not otherwise contest the voluntariness of his plea of guilty. A transcript of the plea was furnished with respondents' answer and motion to dismiss and conclusively shows that he was carefully examined by the Court before the plea was accepted. Therefore, it must stand. Predictions of counsel of the duration of a sentence, without more, are not grounds for attacking an otherwise valid plea of guilty. *Swanson v. United States*, 304 F. 2d 865 (8th Cir. 1962).

After the entry of a valid plea of guilty, there is no duty of counsel to inform a defendant of his right to appeal. *Songer v. Coiner*, mem. dec., No. 14,818 (4th Cir., November 4, 1971); *LeDoux v. Peyton*, mem. dec., No. 13,599 (4th Cir., April 25, 1972).

There is no constitutional right to a post-conviction hearing. A post-conviction hearing pertains only to the exhaustion of state remedies. *Robinson v. Blackledge*, mem. dec., No. 71-1124 (4th Cir., September 10, 1971); *Noble v. Sigler*, 351 F. 2d 673 (8th Cir. 1965).

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the application for writ of habeas corpus of Gary Darrell Allison, filed February 15, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 27, 1973

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: Patricia F. Kimball
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON, Petitioner,
v.
DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondents.

C-71-G-73

ORDER

GORDON, Chief Judge

This action was referred to United States Magistrate, Herman Amasa Smith, for preliminary review pursuant to the provisions of 28 U.S.C. § 636(b) and Local Rule 50, Rules of Practice and Procedure. The Magistrate has submitted to the Court a Memorandum and Recommendation.

The Court has examined the files and records of the action and has independently determined that the petition is without merit, and that the relief sought should be denied for the reasons appearing in the Magistrate's Memorandum and Recommendation, which is attached and made a part of this Order.

IT IS HEREBY ORDERED that the petition for rehearing of Gary Darrell Allison, filed September 4, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 16, 1974

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: Patricia F. Kimball
Deputy Clerk

C-71-G-73

MAGISTRATE'S MEMORANDUM AND RECOMMENDATION

Gary Darrell Allison

By Memorandum Opinion and Order entered 28 August 1973, this Court dismissed petitioner's application for a writ of habeas corpus. On September 4, 1973, petitioner, with the aid of a writ room clerk, filed a petition for a rehearing. That petition sought to bring petitioner's plea of guilty within the ambit of *Santobello v. New York*, 404 U. S. 257 (1971). The petitioner claimed that he had witnesses to prove that plea bargaining took place and that the bargain was not kept. On April 29, 1974, a Memorandum Order was entered directing him to file within 30 days from the date of the entry of the Order affidavits of his witnesses with such proof of his allegations as he might be able to muster. The respondents were then allowed to file counter affidavits within 21 days after the receipt of the petitioner's affidavits.

On May 13, 1974, the petitioner addressed a letter to Chief Judge Eugene Gordon which alleged that his codefendant who had a statement to make for the Court was unable to have it notarized. A copy of that letter was sent to the respondents by letter dated May 16, 1974. The respondents wrote the

Court on May 20, 1974, a copy of which was sent to Allison, informing him that the superintendent of the Graham Unit was a notary public and that his witnesses might appear before him to execute any affidavits. Subsequently, on May 17, 1974, the petitioner wrote Judge Gordon again. He wrote that he had received a letter from his mother indicating that the papers had been notarized but were destroyed by the notary public. In response to that charge, May 22, 1974, our Clerk of Court, Carmon J. Stuart, Esquire, was directed to write Mr. Allison. That letter suggested that Allison submit to the Court an affidavit of his mother, or anyone else who had first-hand knowledge of the fact, that a notarized statement in Allison's behalf was destroyed, giving the name of the person who destroyed it and describing the circumstances. Mr. Stuart also suggested that if Allison's codefendant was willing to make a statement and was unable to get it notarized that he document his efforts and send it to the Court. No further communication was received from the petitioner until 6 August 1974 when he wrote complaining of the disparity of sentences given him and his codefendant.

It is submitted that *Santobello, supra.*, stands for the proposition that when a petitioner furnishes evidence that plea bargaining has taken place *and* that promises made to induce his plea were not kept, the Court must go behind the transcript of his plea of guilty, regardless of the inconsistency existing between his in-court declarations under oath and his subsequent statements.

It is submitted that Allison has been given ample opportunity to support his allegations of plea bargaining and to show that his plea was involuntarily induced by an unkept promise. Having failed in this regard, IT IS RECOMMENDED that an Order be entered dismissing his petition for rehearing.

Herman Amasa Smith
United States Magistrate

14 August 1974

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1738

Gary Darrell Allison,

Appellant,

v.

Stanley Blackledge, Warden, Central Prison, and State of North Carolina,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, Chief Judge.

Argued December 2, 1975 Decided April 13, 1976

Before HAYNSWORTH, Chief Judge, and WINTER and FIELD, Circuit Judges.

C. Frank Goldsmith, Jr. [court-appointed counsel], (Story, Hunter, and Goldsmith, on brief) for Appellant; Richard N. League, Assistant Attorney General of North Carolina, and (Rufus L. Edmisten, Attorney General of North Carolina, on brief) for Appellees.

WINTER, Circuit Judge:

Gary Darrell Allison, a North Carolina prisoner incarcerated under state law, appeals from the summary denial of his petition for a writ of habeas corpus. He sought issuance of the writ on the ground, *inter alia*, that his plea of guilty to attempted safe robbery was involuntary. Because we are persuaded that Allison sufficiently alleged a claim of involuntari-

ness, we reverse the order denying issuance of the writ and remand the case for further proceedings.

I.

In Allison's petition for a writ of habeas corpus, he alleged, with regard to the claim that his plea was involuntary, that he was brought to trial on charges of (a) safe robbery, (b) breaking, entering and larceny, and (c) possession of burglary tools. During a recess of the trial, Allison was led to believe by his counsel that counsel

> had talked the case over with the Solicitor and the Judge, and that if the petitioner would plead guilty, that he would only get a 10 year sentence of penal servitude.

He alleged further that his conversation with his lawyer was "witnessed" by another person other than Allison and his lawyer, that he entered a plea of guilty to attempted safe robbery because he believed that he would receive only a ten-year sentence, but that after his plea was accepted he was sentenced to a term of seventeen to twenty-one years. In supplementation of his claim, Allison said that he had been "promised by his Attorney, *who had consulted presumably* with the Judge and Solicitor, that he was only going to get a ten year sentence . . . (emphasis in original)." He conceded that he was questioned by the trial judge prior to sentencing, and, by implication, that in his answers he denied that any promises had been made to him; but since he thought "he was only going to get ten years, and had been instructed to answer the questions so that the Court would accept the guilty plea," he was not now precluded from attacking its voluntariness.

In answer, the state asserted that the plea was voluntary. It filed the transcript of Allison's plea—a printed form setting forth certain questions with Allison's written answers, signature and verification. The question of whether Allison's lawyer had made any promise or threat to induce the plea was answered

negatively; and the question of whether Allison's plea was freely, understandingly and voluntarily made was answered affirmatively.

The district court dismissed Allison's petition summarily. It was of the view that the transcript of plea showed that the plea was made voluntarily. Referring to the allegation that Allison's lawyer "presumably" talked to the court and the prosecutor, the district court held that predictions of counsel as to the duration of a sentence provided no ground for attacking an otherwise valid plea of guilty.

Allison then filed a petition for rehearing. In essence, he argued that an unkept promise of counsel could render a guilty plea involuntary and that he was entitled to an evidentiary hearing to afford him the opportunity to prove that such a promise had been made to him. The petition for rehearing was referred to a magistrate who entered a memorandum order reciting that the burden was on Allison to prove that he was the victim of an unkept promise and directing Allison to file "an affidavit of his witness, and such other proof of his allegation with respect to the promise he maintains was not kept."

Apparently Allison experienced substantial difficulties in trying to comply with the magistrate's order. They need not be detailed, nor their sufficiency or accuracy examined. The fact is that the affidavit and other proof were not forthcoming, and the district court denied the petition for rehearing and dismissed the action for noncompliance.

II.

Taken in their entirety, Allison's allegations are that he was induced to plead guilty by his attorney's promise, which he was led to believe was made after consultation with the prosecutor and the judge, that he would receive a sentence of not more than ten years. That promise, if made, was not kept; and if the promise can be proved, Allison's plea was not

voluntary. Machribroda v. United States, 368 U.S. 487 (1962). Of course, in *Machribroda* the promise was made by the prosecutor, but *Machribroda* has been extended to the representations by an accused's counsel that, by prearrangement with the prosecutor or the court, a plea of guilty will not result in greater than a given punishment when, in fact, a greater punishment is imposed. United States v. Hawthorne, 502 F. 2d 1183 (3 Cir. 1974); United States v. Valenciano, 495 F. 2d 585 (3 Cir. 1974); Roberts v. United States, 486 F. 2d 980 (5 Cir. 1973); Walters v. Harris, 460 F. 2d 988 (4 Cir. 1972) (by implication), cert. den., 409 U. S. 1129 (1973). Such a representation is far different from a mere prediction by counsel as to the length of sentence which is likely to result from a guilty plea.

Although Allison alleged an unkept promise or representation of his attorney, at the time he pleaded he represented that his attorney had made no promises or inducements to get him to plead and that his plea was voluntary. Ordinarily Allison would be held to his statement at the time he entered his plea unless he advanced a reasonable explanation for his inconsistent allegations. Crawford v. United States, 519 F. 2d 347 (4 Cir. 1975). Such an explanation is advanced here. Allison alleges that he answered as he did when he entered his plea because he had been instructed so to answer in order for the trial court to accept his guilty plea. Allison is therefore not foreclosed by the statements he made in order to effect acceptance of his plea from subsequently attacking its voluntariness. Edwards v. Garrison, ... F. 2d ..... (4 Cir., October 13, 1975).

We hold therefore that the district court erroneously denied Allison's petition for a writ of habeas corpus and reconsideration of its denial without conducting an evidentiary hearing to determine the truth of what Allison alleged—both that a promise inducing the plea was made, and that its existence was concealed to effect acceptance of the plea.

III.

We are constrained to add a further word about the procedure followed in the disposition of this case with regard to the magistrate's order that Allison file an affidavit and proof of his allegations before his petition for reconsideration would be decided on its merits, and the district court's denial of the petition for reconsideration and dismissal of the action for failure to comply with the magistrate's order.

Where, as here, an indigent prisoner, proceeding *pro se*, alleges a cause of action which, if proved, would entitle him to post-conviction relief, we think it improper to require him to document that claim or support it by affidavits of his witnesses before affording him the evidentiary hearing to which he is otherwise entitled. Bryan v. United States, 492 F. 2d 775, 783 (5 Cir.) (dissenting opinion), *cert. denied*, 419 U. S. 1079 (1974). Of course we do not hold that the summary judgment procedure of Rule 56, F.R. Civ. P., is inapplicable to applications for writs of habeas corpus by state prisoners. If the state moves for summary judgment in such a case and offers affidavits and other proof that the petitioner's claim is lacking in merit, a *pro se* petitioner may be required, after being advised of his rights and how to proceed, to offer counter affidavits or other proof to establish that material facts are genuinely disputed before he is afforded an evidentiary hearing. If, in such a situation, the petitioner fails to respond and offers no reasonable explanation why he cannot respond, summary judgment may properly be entered against him. But the point is that a *pro se* petitioner is not to be put to a greater burden to obtain an evidentiary hearing when he has alleged a case which, if proved, would entitle him to relief than any other plaintiff in any other type of action.

REVERSED AND REMANDED.

ADDENDUM

After circulation of the majority opinion and the special

concurrence to the nonsitting members of the court, a motion was made within the court to rehear the case in banc and a poll on the motion was requested. The motion failed for want of a majority of those eligible to vote in the poll.

FIELD, Circuit Judge, concurring specially:

I concede, albeit reluctantly, that recognition of *Edwards v. Garrison*, ... F. 2d ..... (No. 74-1791, 4 Cir. October 13, 1975), as viable precedent supports the reversal in this case. It occurs to me, however, that over the past few years this court has written a "Looking-glass book"[1] in this area.

It began with the decision in *Walters v. Harris*, 460 F. 2d 988 (4 Cir. 1972). In that case a federal defendant filed a § 2255 motion alleging that he had entered his guilty plea upon the promise of a government attorney that he would receive a sentence which was lighter than that ultimately imposed by the court. Although the record disclosed that the defendant had assured the court that no promise had been made to induce his guilty plea, the panel stated "that the defendant's responses alone to a general Rule 11 inquiry cannot be considered conclusive evidence that no bargain occurred," 460 F. 2d at 993, and remanded the case to the district court for an evidentiary hearing. Conceding that its conclusion placed us in conflict with at least four other circuits,[2] the panel held that the charge of involuntariness was not refuted by the defendant's denial at arraignment that any promise had induced his plea.

Two years after *Harris* we again had occasion to consider this question in *Crawford v. United States*, 519 F. 2d 347 (4

---

1. "Why, it's a Looking-glass book, of course! And, if I hold it up to a glass, the words will all go the right way again."
The Annotated Alice—Alice in Wonderland and Through the Looking Glass by Lewis Carroll—p. 191, Bramwall House, 1960.

2. Pursley v. United States, 391 F. 2d 224 (5 Cir. 1968); Norman v. United States, 368 F. 2d 645 (3 Cir. 1966); Putnum v. United States, 337 F. 2d 313 (10 Cir. 1964); United States v. Davis, 319 F. 2d 482 (6 Cir. 1963).

Cir. 1975). In that case we affirmed the district court's dismissal of the § 2255 motion, stating:

> "Accordingly, we adopt the rule that the accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so. Stated otherwise, we hold that a defendant should not be heard to controvert his Rule 11 statements in a subsequent § 2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." 519 F. 2d, at 350.

This encouraging pronouncement in *Crawford* was short-lived for less than three months later we handed down our decision in the consolidated cases of *Edwards v. Garrison*, (No. 74-1791) and *Bass v. United States* (No. 74-2038), *pub. sub nom Edwards v, Garrison*, ... F. 2d .....

Edwards involved a state prisoner who charged that his guilty plea was induced by a promise made by his counsel with respect to the sentence he would receive despite the fact that he had affirmed to the court that no promises had been made. The panel held that an evidentiary hearing was required on the issue of voluntariness and, referring to the decision in *Walters v. Harris, supra*, stated:

> "Although Walters was a federal prisoner prosecuted in a federal court and Edwards is a state prisoner prosecuted in a state court, the same reasoning applies. In either case the unallayed apprehensions of the accused make general inquiries about inducements unreliable in unearthing plea bargains. Not having been asked if he claimed that a plea bargain had been made, Edwards' denial, at the time he entered his plea, that any promise had induced him to tender it does not foreclose inquiry into his later allegation suggesting

> that a plea bargain may have been made." ..... F. 2d, at .....

The opinion in *Edwards* concluded with the observation that the decision was of limited precedential significance since the court had been advised that the state practice had been amended to pose "questions to the prosecutor, the accused, and his lawyer designed to elicit a full disclosure of any plea negotiations and any bargain that was reached." ..... F. 2d at .....

Any conclusion that specific inquiry relative to a possible plea bargain might be the touchstone to finality in such a case was quickly dissipated, however, by the panel's disposition of the *Bass* case in the same opinion. In *Bass*, the record disclosed that prior to accepting the guilty plea the district judge had advised the defendant that the Supreme Court had approved the practice of plea bargaining, that a plea bargain was proper and that if any bargains had been made Bass "should have no hesitancy" in revealing such information to the court. In response to the court's inquiry, the attorney for Bass stated that in return for the guilty plea the government had promised to recommend a three year sentence. The district court went on to explain that it would not be bound by the government's recommendation and could in fact impose whatever sentence it felt would be necessary up to the statutory maximum. Bass stated that he understood this fact and persisted in his plea. Despite these representations to the court, in his § 2255 motion Bass alleged that the prosecutor and his lawyer assured him that the government's recommendation would be binding on the court and that his lawyer advised him to suppress his truthful answer that he did not wish to plead guilty if the district court would not treat the government's recommended sentence as binding on it. The panel held that despite the thorough inquiry of the district court with respect to a possible plea bargain, Bass "may now be heard to controvert those statements and to seek to establish that he gave those answers solely on the advice of his lawyer to the end that his plea was

not voluntarily and understandingly made and should be stricken." ..... F. 2d, at .....

A distillation of these decisions demonstrates to me that no matter how searching the inquiry of the court may be on the issue of voluntariness, no trial judge, state or federal, can protect himself against a later complaint by a convicted criminal that his plea was voluntarily entered by reason of some covert promise or understanding dehors the record. It is disturbing to note that all too often the convicted petitioner in such a case alleges that he was advised by his attorney to give false answers to the questions propounded by the court, and our opinions have unfortunately recognized such a charge as a valid allegation which can only be resolved by an evidentiary hearing.[3] I suggest that the dignity and weight which we accord such irresponsible allegations is utterly unrealistic, for to me it is inconceivable that any attorney in his right mind would jeopardize his professional reputation and his license to practice law by engaging in such conduct.[4]

Additionally, in many cases presently coming before this court from state prisoners, the petitioner has vouched not only orally, but has confirmed in writing under oath that no improper influence or promise has accounted for his plea. Nevertheless, merely on the prisoner's allegations, we permit the solemn record and act of the trial court to be impugned.

---

3. In distinguishing the *Bass* case from the earlier decision in *Crawford*, the *Edwards* panel stated:

> "In suggesting reasons why in unusual cases a federal prisoner should be permitted to controvert his statements at arraignment, we said '[h]*e may have been advised to give answers that the court would require in order to accept the plea, rather than those which reflected the truth.*' ..... F. 2d at ..... *Bass has alleged just that.* It follows that he must be given the opportunity to prove his allegations in a plenary hearing." (Emphasis added), ... F. 2d, at .....

4. It is significant that in a great number of these cases the attorney charged with such conduct was performing a public service to the court by acting as appointed counsel for the defendant.

Stripped of all euphemism, the plain truth is that these petitioners either lied to the trial judge at the time they entered their guilty pleas, or they are later lying to the federal court in an attempt to overthrow their convictions. I can discern no middle ground, and in effect we reward them for this self-admitted mendacity by ordering an evidentiary hearing.

I do not believe I am alone in the observation that the once Great Writ has been badly abused in the federal courts over the past decade, and I fear that we have unwittingly encouraged such abuse by our decisions in cases such as this.

APPENDIX

In the Supreme Court of the United States

October Term, 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden
Central Prison, and STATE OF
NORTH CAROLINA

Petitioners

- v. -

GARY DARRELL ALLISON,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED
MAY 22, 1976
CERTIORARI GRANTED OCTOBER 4, 1976

INDEX

RELEVANT DOCKET ENTRIES

(1) 2-15-73 PETITION FOR WRIT OF HABEAS CORPUS filed.

(2) 3-8-73 ANSWER TO PETITION AND MOTION TO DISMISS filed by respondent with copies of state court papers.

(3) 8-28-73 MEMORANDUM OPINION AND ORDER of Judge Gordon denying application for writ of habeas corpus and dismissing action.

(4) 9-4-73 PETITION FOR REHEARING filed by petitioner.

(5) 4-29-74 MEMORANDUM ORDER of Magistrate Smith directing Petitioner to file within 30 days of this Order an affidavit of witness or such other proof of allegation as to unkept promise negotiated in plea bargaining, and to serve a copy of affidavit on respondents; and directing respondent to file such affidavit as may be appropriate 21 days thereafter.

(6) 8-16-74 ORDER of Judge Gordon denying petition for rehearing and dismissing action.

(7) 9-9-74 PETITIONER'S MOTION FOR RECONSIDERATION filed with statement of Dana Eugene Laster.

(8) 9-26-74 ORDER of Judge Gordon denying motion for reconsideration, dismissing action and ordering action closed.

(9) 4-14-76 OPINION of Fourth Circuit, reversing decision of District Court and remanding action.

(10) 5-22-76 PETITION FOR CERTIORARI filed by respondents below.

(11) 10-4-76 PETITION FOR CERTIORARI granted.

RELEVANT EXCERPTS FROM PETITIONER'S APPLICATION FILED FEBRUARY 15, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GARY DARRELL ALLISON, Petitioner.	)	
v.	)	PETITION FOR
DR. STANLEY BLACKLEDGE, Warden	)	WRIT OF
Central Prison, Raleigh, N. C. and	)	HABEAS CORPUS
STATE OF NORTH CAROLINA, Respondent.	)	No. C-71-G-73

* * * * * * *

13. State concisely every ground on which you base your allegation that you are being held in custody unlawfully and in violation of the Constitution or laws of the United States:

(a) Petitioner contends that his guilty plea was induced by an unkept promise, and therefore was not the free and willing choice of the petitioner, and should be set aside by this Court. An unkept bargain which has induced a guilty plea is grounds for relief. SANTOBELLO v. NEW YORK, 404 U.S. 257, 267 (1971).

* * * * * * *

14. State fully and concisely, and in the same order all available evidence, documentary or otherwise, which you claim will support each of the grounds set out in item (13):

(a) The petitioner was charged with and brought to trial on the charges of safe robbery, and two (2) counts of breaking, entering and larceny and possession of burglary tools.

The petitioner was led to believe and did believe, by Mr. Pickard, that he Mr. N. Glenn Pickard had talked the case over with the Solicitor and the Judge, and that if the petitioner

would plea [*sic*] guilty, that he would only get a 10 year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel.

That the petitioner had entered pleas of not guilty and the case was called and a recess was called, and it was at this recess, that the petitioner agreed to plead guilty, because he was told that he had to do so, because the jury was going to find him guilty because his co-defendant was going to plead guilty.

The petitioner believing that he was only going to get a ten year active sentence, allowed himself to be pled guilty to the charge of attempted safe robbery, and was shocked by the Court with a 17-21 year sentence. In MACHRIBRODA v. UNITED STATES, 368 U.S. 487 [*sic*] it was held that a guilty plea induced by a promise was involuntary.

The petitioner was promised by his Attorney, who had consulted presumably with the Judge and Solicitor, that he was only going to get a ten year sentence, and therefore because of this unkept bargain, he is entitled to relief in this Court. An assurance by another that Petitioner would receive a particular sentence therefore since the trial Judge was the only authority as to the length of sentence, the unkept bargain which induced the guilty plea would invalidate the guilty plea. SANTOBELLO v. NEW YORK, SUPRA. [*sic*]

The petitioner is aware of the fact that he was questioned by the trial Judge prior to sentencing, but as he thought he was only going to get ten years, and had been instructed to answer the questions, so that the Court would accept the guilty plea, this fact does not preclude him from raising this matter especially since he was not given the promised sentence by the Court.

It is clear that the United States Supreme Court specifically approved of plea bargaining in SANTOBELLO, SUPRA, and it is equally clear that plea bargaining, when same has been held as in this matter, should appear upon the face of the record. WALTERS v. HARRIS, 460 F. 2d 988 (1972 4th Cir.)

It is clear that the petitioner is entitled to relief in this Court, if in fact, he plead guilty, to the charge of attempted safe robbery, upon the belief that he was only going to receive a ten year sentence. The fact that the Judge, said that he could get more, did not affect, the belief of the petitioner, that he was only going to get a ten year sentence.

It was as said in United States v. Williams, 407 F. 2d 940, 949 n. 13 (4th Cir. 1969):

> ". . . If the Judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, . . . (the defendant) would no more challenge the statement in open court than he would challenge a clergyman's sermon from the pulpit."

Because of the above, it is clear that the response given in Court by this petitioner cannot be used as conclusive proof that the guilty pleas [*sic*] was not induced by a promise that was not kept as contended by the petitioner in this cause, See: REED v. UNITED STATES, 441 F. 2d 569 (9th Cir. 1971); UNITED STATES v. SIMPSON, 436 F. 2d 162 (D.C. Cir. 1970); UNITED STATES v. McCARTHY, 433 F. 2d 591 (1st Cir. 1970); TROTTER v. UNITED STATES, 359 F. 2d 419 (2d Cir. 1966).

WALTERS v. HARRIS, Supra. Pamphlet decision Pages 11-12 says:

> ". . . Surely in the future the United States Supreme Court's approval of plea bargaining, Santobello, Supra, will dispel the doubt about the validity of plea bargaining that has caused plea bargains traditionally to be shrouded in

> secrecy. "We reiterate what we have said before: That when plea bargaining occurs it ought to be spread on the record and publicly disclosed. 'RAINES, Supra, at 530. (I) f (a plea) was induced by promises, the essence of those promises must in some way be made known' Santobello, Supra at ...."

The guilty plea to attempted safe robbery and sentence of 17 to 21 years is invalidated and made involuntary by the unkept promises in this cause of only a ten year maximum sentence, and should be set aside and vacated by this Court, 6th, 6th [*sic*] and 14th Amendments to the Constitution.

* * * * * * *

(Verification omitted in printing)

RESPONDENTS' ANSWER FILED MARCH 8, 1973 IN THE U. S. DISTRICT COURT

(Caption omitted in printing)

The respondent answering and moving to dismiss the petition for writ of habeas corpus filed herein says:

1. The historical allegations of petitioner's application are not denied. It is denied his rights were violated and specifically that there was an unkept plea bargain in his case. It is admitted that petitioner has exhausted his state remedies.

FURTHER ANSWER

1. Petitioner contends his rights were violated because (a) his guilty plea was involuntary having been iduced by an unkept plea bargain; (b) he was not advised of his right to appeal and (c) he did not receive a post-conviction hearing. These contentions merit him no relief.

2. With regard to contentions (a) and (c) respondent adopts its answer filed in the North Carolina Court of Appeals upon petitioner's application for certiorari. It supplements the authority cited with regard to contention (c) by showing the court that the failure to grant a post-conviction hearing is relevant only to the exhaustion of state remedies and defects therein create no independent rights for relief, ROBINSON v. BLACKLEDGE, No. 71-1124 (4th Cir. 1971).

3. As petitioner pled guilty there was no duty to inform him of the right to appeal, SONGER v. COINER, No. 14,818 (4th Cir. 1971), LeDOUX v. PEYTON, No. 13,599 (4th Cir. 1972).

WHEREFORE, respondent having fully answered the petition for writ of habeas corpus filed herein prays that Your Honor will deny the said petitioner's application and that a writ of habeas corpus will not be issued in his behalf.

Respectfully submitted,

ROBERT MORGAN
Attorney General

Richard N. League
Assistant Attorney General

(Verification and certificate of service omitted in printing)

EXCERPTS FROM ATTACHMENT TO RESPONDENTS' ANSWER ORIGINALLY FILED IN NORTH CAROLINA COURT OF APPEALS

* * * * * * *

Petitioner contends that his plea of guilty was involuntarily entered upon a promise by his attorney that if he were to enter such a guilty plea, he would be sentence to no more than ten years imprisonment. The transcript of plea taken in open court evidences that the petitioner was fully aware of the consequences of his entering the plea of guilty to attempted safe robbery. The petitioner testified that he understood that he could be sentenced for a term of ten years to life imprisonment as punishment for the offense to which he was pleading guilty. The petitioner testified that no one had made any promise or threat to induce or influence him to plead guilty to the offense, that he was pleading guilty to attempted safe robbery of his own free will and, that he was in fact guilty.

A plea of guilty entered with advice of counsel is presumptively valid, the burden being upon the petitioner to demonstrate that the plea was not voluntarily made. U.S. ex rel SADLER v. PENNSYLVANIA, 438 F. 2d 997 (3rd Cir. 1970). The petitioner fails to meet the burden. The transcript shows that the petitioner was fully advised of the consequences of his plea, including the maximum sentence that he could receive, and that he was not induced by his attorney to plead guilty to the offense charged. The examination and inquiry by the trial judge is in complete accord with the decision of the Supreme Court of the United States in BOYKIN v. ALABAMA, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969), holding that a trial judge, before accepting a plea of guilty, must make an affirmative showing that the plea was voluntarily and understandingly entered. If the petitioner were able to contest the

voluntariness and his understanding of the consequences of his guilty plea, with the present record before us, the purpose to be served by the requirements of BOYKIN v. ALABAMA, supra, would be of nominal affect.

* * * * * * *

PETITIONER'S INDICTMENT IN ALAMANCE COUNTY SUPERIOR COURT

STATE OF NORTH CAROLINA
County of Alamance
The State of North Carolina
vs.
Gary Darrell Allison
Defendant

File # 71CR15073
In The General Court of Justice
Superior Court Division
January 17, Session, 1972
INDICTMENT — VARIOUS CASES
THREE COUNTS

THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Gary Darrell Allison late of the county of Alamance on the 8th day of December 1971, with force and arms, at and in the County aforesaid, unlawfully, wilfully, and feloniously did break and enter a certain building, to-wit: a store building occupied by Byrd Food Stores, Inc. situated at 717 East Davis Street, Burlington, North Carolina, with the intent to steal, take and carry away the merchandise, chattels, money and other personal property therein situated of the said Byrd Food Stores, Inc. contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

AND THE JURORS FOR THE STATE UPON THEIR OATH FURTHER PRESENT, That on said day and year aforesaid, at and in the County and State aforesaid Gary Darrell Allison late of said County, unlawfully and wilfully, and feloniously did by the use of a wrecking bar, hammer, nail bars and other hand tools attempt to force open the safe of Byrd Food Stores, Inc. situated at 717 East Davis Street, Burlington, North Carolina, used for storing chattels, money and other

valuables contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

AND THE JURORS FOR THE STATE UPON THEIR OATH FURTHER PRESENT, That on said day and year aforesaid, at and in the County and State aforesaid Gary Darrell Allison late of said County, unlawfully and wilfully and feloniously did have in his possession, without lawful excuse, implements of house-breaking, to-wit: crow bar, hammer, nail bars and other hand tools contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State.

/s/ Pierce
Solicitor

TRANSCRIPT OF PLEA IN ALAMANCE COUNTY SUPERIOR COURT

(Caption omitted in printing)

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer: Yes
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer: No
3. Do you understand that you are charged with the felony of Attempted Safe Cracking? Answer: Yes
4. Has the charge been explained to you, and are you ready for trial? Answer: Yes
5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer: Yes
6. How do you plead to the charge of Attempted Safe Cracking—Guilty, not Guilty, or nolo contendere? Answer: Guilty
7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer: Yes

   (b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer: .....
8. Do you understand that upon your plea of guilty you could be imprisoned for as much as minimum of 10 years to life? Answer: Yes
9. Have you had time to subpoena witnesses wanted by you? Answer: Yes
10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer: Yes

11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promises or threat to you to influence you to plead guilty in this case?
Answer: No

12. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of guilty? Answer: Yes

13. Do you have any questions or any statement to make about what I have just said to you? Answer: No

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

Gary Darrell Allison
Defendant

Sworn to and subscribed before me this 24th day of January, 1972.

AOC-L Form 158
Rev. 10/69

Catherine Sykes, Ass't.
Clerk Superior Court

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, Gary Darrell Allison, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, M. Glenn Pickard, who was (court appointed); and the defendant through his attorney, in open Court, plead (guilty) to Attempted Safe Cracking as charged in the (warrant) (bill of indictment), of Breaking & Entering, Safe Burglary & Possession of Burglary Tools and in open Court, under oath further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;

2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads guilty;

3. He is guilty of the offense(s) to which he pleads guilty;

4. He authorizes his attorney to enter a plea of guilty to said charge(s);

5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;

6. He is ready for trial;

7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of guilty, by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of guilty be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This 24th day of January, 1972.

Marvin Blount Jr.
Judge Presiding

EXCERPTS FROM JUDGMENT AND COMMITMENT IN ALAMANCE COUNTY SUPERIOR COURT

(Caption omitted in printing)

In open court, the defendant appeared for trial upon the charge or charges of Breaking and Entering, Safe Robbery and Possession of Burglary Tools, and thereupon entered a plea of guilty to Attempted Safe Robbery. Transcript of plea and adjudication of acceptance were entered. Defendant appeared with counsel. The court heard evidence for the state and for the defendant. The defendant was given an opportunity to speak and did speak.

Having pleaded guilty of the offense of Attempted Safe Robbery which is a violation of G.S. 14-89 and of the grade of Felony [I]t is ADJUDGED that the defendant be imprisoned for the term of not less than Seventeen (17) nor more than Twenty One (21) years in the custody of the Commissioner of North Carolina Department of Corrections. It is ordered that the defendant be given credit for 51 days spent in jail pending trial.

* * * * * * * *

This 27th day of January, 1972.

Marvin Blount Jr.
Presiding Judge

COURT'S FIRST ORDER DISMISSING CASE FILED AUGUST 28, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON, Petitioner,	)	
v.	)	
DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondents.	)	C-71-G-73

MEMORANDUM OPINION AND ORDER

GORDON, Chief Judge

Petitioner is a state prisoner seeking habeas corpus relief. He has been allowed to proceed as a pauper.

Petitioner alleges that his plea of guilty was invalid, that he was not informed of his right to appeal and he has been denied a post-conviction hearing.

The respondents' motion to dismiss will be granted.

Petitioner alleges that counsel "presumably" talked with the Court and solicitor and that counsel told him if he entered a plea of guilty he would get but ten years. Petitioner was sentenced to 17 to 21 years for safe robbery. Petitioner does not otherwise contest the voluntariness of his plea of guilty. A transcript of the plea was furnished with respondents' answer and motion to dismiss and conclusively shows that he was carefully examined by the Court before the plea was accepted. Therefore, it must stand. Predictions of counsel of the duration of a sentence, without more, are not grounds for attacking an otherwise valid plea of guilty. *Swanson v. United States*, 304 F. 2d 865 (8th Cir. 1962).

After the entry of a valid plea of guilty, there is no duty of counsel to inform a defendant of his right to appeal. *Songer v. Coiner*, mem. dec., No. 14,818 (4th Cir., November 4, 1971); *LeDoux v. Peyton*, mem. dec., No. 13,599 (4th Cir., April 25, 1972).

There is no constitutional right to a post-conviction hearing. A post-conviction hearing pertains only to the exhaustion of state remedies. *Robinson v. Blackledge*, mem. dec., No. 71-1124 (4th Cir., September 10, 1971); *Noble v. Sigler*, 351 F. 2d 673 (8th Cir. 1965).

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the application for writ of habeas corpus of Gary Darrell Allison, filed February 15, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Memorandum Opinion and Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 27, 1973

EXCERPTS FROM PETITION FOR REHEARING FILED SEPTEMBER 4, 1973 IN U.S. DISTRICT COURT

(Caption omitted in printing)

* * * * * * *

POINT IV

Point 4: An evidentiary hearing is required despite his statement made to the court prior to entry of guilty plea to effect that no promise had been made. Said statement was evidentiary, but NOT conclusory.

POINT V

Point 5: The Court is here limited to deciding whether the was or was not induced by an unkept bargain; that the writ should not be dismissed for failure to state a claim unless it appears beyond doubt that the petitioner can prove no set of facts in support of his claim which would entitled him to relief; that this is not to say that the petitioner can prove these allegations, or that the respondent did not have just cause for accepting the plea. These are matters of proof; that the petitioner contends that his trial counsel breached his promise; that his plea of guilty arised out of and developed from said promise; but that this Court apparent of the opinion that the record conclusively shows that he was carefully examined by the Court below-before the plea was accepted; that therefore, it must stand; that no record has been made as to whether petitioner's counsel did or did not breach his promise, and; that the record is absence of any showing either in law or in fact that the respondent refuted or did not refute that petitioner's counsel did not breach his promise except what the transcript of record shows.

POINT VI

Point 6: In this case, we must look beyond the record. That if it is true that petitioner's counsel told him if entered a plea of guilty he would get but ten years. It then is clear that his

plea bargain would be void. The petitioner has not been given an opportunity to submit his own evidence or controvert the respondents' record. Nor is it clear as to whether or not petitioner's counsel breached his promise and/or told him if he entered a plea of guilty he would get but ten years.

POINT VII

Whether counsel did or did not tell petitioner if he entered a plea of guilty he would get but ten years is a question of truth and requires scientific expression either by voluntary answering or by undergoing cross-examination. There has been no cross-examination of counsel in this case. If it was the Court opinion that that the writ should be dismissed because the record conclusively shows that he was carefully examined by the Court before the plea was accepted, the Court was mistaken. The burden is not met merely by the filing of an answer which controverts the allegations of the writ or which relies solely on Swanson v. United States, 304 F. 2d 865 (8th Cir.-1962). The Supreme Court held that an evidentiary hearing is required despite a petitioner's plea of guilty made to the court prior to entry of guilty plea to effect that no promise had been made; that said statement was evidentiary, but NOT conclusory. United States v. McCarthy, 433 F. 2d 591, 7 CLB 271 (1970). The value of a full evidentiary hearing is exemplified by Townsend v. Sain, 372 U. S. 293 (1963).

* * * * * * *

Respectfully submitted,
/s/ Gary Darrell Allison

(Verification omitted in printing)

MAGISTRATES' ORDER REOPENING CASE FILED APRIL 29, 1974

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA GREENSBORO DIVISION

GARY DARRELL ALLISON, Petitioner,	)	
v.	)	
DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondents.	)	C-71-G-73

MEMORANDUM ORDER

By Memorandum Opinion and Order entered 28 August 1973 this Court dismissed petitioner's application for a writ of habeas corpus. On September 4, 1973, petitioner, with the aid of Writroom Clerk Daniel Ross, filed a petition for rehearing. Pursuant to Local Rule 50, the action was directed to the attention of the Magistrate for preliminary review.

Petitioner originally alleged that "presumably" his attorney talked with the solicitor and the judge and as a result, his attorney told him he would get but 10 years if he entered a plea of guilty. Petitioner alleges that he has a witness to this conversation with counsel. He maintains that his plea of guilty was entered as a result of his attorney's assurances; that he got more time than was promised; and that he is thus the victim of an unkept promise, negotiated in plea bargaining. By innuendo, he maintains that his answer given to the Court, and recorded as his Transcript of Plea, was in fact false. (See question 11).

It is the responsibility of the petitioner to prove his allegation. Therefore, he is directed to file, within thirty (30) days

from the date of the entry of this order, an affidavit or his witness, and such other proof of his allegation with respect to the promise he maintains was not kept. He is hereby ORDERED to furnish a copy of the affidavit to the respondents. Within twenty-one (21) days thereafter, the respondent is directed to file such affidavits as may be appropriate.

The Clerk is directed to transmit by certified mail, return receipt requested, *deliver to addressee only*, two copies of this Memorandum Order to the petitioner at the North Carolina Department of Correction, Post Office Box 578, Yadkinville, North Carolina, 27055, and two certified copies to the Attorney General of the State of North Carolina.

Herman Amasa Smith
United States Magistrate

26 April 1974

LETTER OF PETITIONER FILED MAY 13, 1974 IN THE UNITED STATES DISTRICT COURT

GARY ALLISON
P. O. Box 578
Yadkinville, N. C.

Honorable Eugene Gordon
Middle District Court
Greensboro, N. C.

Dear Sir:

In regards to case number C-71-G-73 from your court in regards to my co-defendant who has a statement to the court but is unable to have them or it notrized [sic]. He is at the North Carolina Department of Correction at the Graham Unit. If you will order someone to assist him in doing something I will appreciate it very much. It may be necessary to have him taken someplace or a U.S. Marshal to see him. His name Dana Lassiter. Thank you for your help. I remain.

/s/ Gary Allison

LETTER OF PETITIONER RECEIVED BY CLERK MAY 17, 1974

Mr. Gordon:

I am writing this in hopes of acquiring some urgent help from you. This is in reference of [sic] Order No. C-71-G-73 that was filed April 29, 1974 to me. I received a letter from my mother saying that the papers had been Notorized and were torn up by the one that Notorized them. I would appreciate if you could check into this, since it is the only way I have of meeting the Courts Order. My Co-defendant also had a paper signed stating they were torn up but I never received them.

I think the people at Graham Camp are trying to keep me from getting any help. I can't meet the dead line without some help. I would appreciate it if you would find out how true this is. I know my Co-defendant will testify what I've said without a doubt. Please help me in this matter. I pray for the Courts indulgence.

Thank you,
/s/ Gary Darrell Allison

LETTER OF CLERK OF U.S. DISTRICT COURT IN RESPONSE TO PETITIONER'S LETTER RECEIVED MAY 17, 1974 DATED MAY 22, 1974

Mr. Gary Darrell Allison
Post Office Box 578
Yadkinville, North Carolina 27055

Dear Sir:

Re: Allison v. Blackledge, et al;
C-71-G-73

Your second letter to Judge Gordon was referred to me for response.

I suggest that you submit to the Court an affidavit of your mother or anyone else who has first-hand knowledge that a notarized statement on your behalf was destroyed, giving the name of the person who destroyed it and describing the circumstances.

If your co-defendant is willing to make a statement and contends that he cannot get it notarized, I suggest that you have him forward, in his own handwriting, a complete statement of the facts as he knows them, together with the detailed facts concerning his efforts to have his statement notarized.

I am sending a copy of your letter to Judge Gordon, to Mr. Richard N. League, Assistant Attorney General, P. O. Box 629, Raleigh, N. C., and I suggest that you furnish him with copies of any further correspondence you have which bears directly upon the merits of your case.

Very truly yours,
/s/ Carmon J. Stuart

CJS: pk

LETTER OF PETITIONER RECEIVED BY CLERK AUGUST 6, 1974

Mr. Gordon,

I am writing this letter to you as an appeal to you and to the Courts. I would like to explain a few things to your Honor. Is it not in the Constitution under Due Process of Law, that all persons be protected with Equal Protection?

Your Honor, me and my Co-Defendant pleaded guilty to Attempted Safe Robbery which you already know. My court papers and Petition were lost during my transfer so I don't remember the Case Number. Me and my Co-Defendant both had a previous felony conviction. The charge which we were charged with at that time carried 10 years to life. I received 17 to 21 years while my Co-Defendant only received 5 to 8 years. While he received less time than the charged carried and I was given more time than I was promised in the plea bargain, then there is no way that I was given Equal Protection.

Your Honor, I have heard through my people that the statement my Co-defendant was supposed to make was not made because he's afraid of his Parole and Work Release. I think that this should be brought to court and my Co-defendant put under oath on the stand. It just doesn't seem right or Justice for me to get all the time and him so small a sentence.

Here is thanking you in advance for what help you can provide me.

Thank you,

/S/ Gary Darrell Allison

COURT'S SECOND ORDER DISMISSING CASE FILED AUGUST 16, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

GARY DARRELL ALLISON, Petitioner,	)	
v.	)	
DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondents.	)	C-71-G-73

ORDER

GORDON, Chief Judge

This action was referred to United States Magistrate, Herman Amasa Smith, for preliminary review pursuant to the provisions of 28 U.S.C. § 636(b) and Local Rule 50, Rules of Practice and Procedure. The Magistrate has submitted to the Court a Memorandum and Recommendation.

The Court has examined the files and records of the action and has independently determined that the petition is without merit, and that the relief sought should be denied for the reasons appearing in the Magistrate's Memorandum and Recommendation, which is attached and made a part of this Order.

IT IS HEREBY ORDERED that the petition for rehearing of Gary Darrell Allison, filed September 4, 1973, be and is hereby denied and the action dismissed.

In accordance with this Court's liberal policy relative to the filing of actions in forma pauperis, 28 U.S.C. § 1915, and in accordance with the intent of Rule 24, Federal Rules of Appellate Procedure, if the petitioner desires to do so, permission to appeal in forma pauperis is hereby granted.

IT IS FURTHER ORDERED that the Clerk mail a certified copy of this Order to the petitioner at his place of confinement and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

August 16, 1974

C-71-G-73

MAGISTRATE'S MEMORANDUM AND RECOMMENDATION

Gary Darrell Allison

By Memorandum Opinion and Order entered 28 August 1973, this Court dismissed petitioner's application for a writ of habeas corpus. On September 4, 1973, petitioner, with the aid of a writ room clerk, filed a petition for a rehearing. That petition sought to bring petitioner's plea of guilty within the ambit of *Santobello v. New York*, 404 U. S. 257 (1971). The petitioner claimed that he had witnesses to prove that plea bargaining took place and that the bargain was not kept. On April 29, 1974, a Memorandum Order was entered directing him to file within 30 days from the date of the entry of the Order affidavits of his witnesses with such proof of his allegations as he might be able to muster. The respondents were then allowed to file counter affidavits within 21 days after the receipt of the petitioner's affidavits.

On May 13, 1974, the petitioner addressed a letter to Chief Judge Eugene Gordon which alleged that his codefendant who had a statement to make for the Court was unable to have it notarized. A copy of that letter was sent to the respondents by letter dated May 16, 1974. The respondents wrote the Court on May 20, 1974, a copy of which was sent to Allison, informing him that the superintendent of the Graham Unit was a notary public and that his witnesses might appear before him to execute any affidavits. Subsequently, on May 17, 1974, the petitioner wrote Judge Gordon again. He wrote that he had received a letter from his mother indicating that the papers had been notarized but were destroyed by the notary public. In response to that charge, May 22, 1974, our Clerk of Court, Carmon J. Stuart, Esquire, was directed to write Mr. Allison. That letter suggested that Allison submit to the Court an affidavit of his mother, or anyone else who had first-hand knowledge of the fact, that a notarized statement in Allison's behalf was destroyed, giving the name of the person who destroyed it and describing the circumstances. Mr. Stuart also suggested that if Allison's codefendant was willing to make a statement and was unable to get it notarized that he document his efforts and send it to the Court. No further communication was received from the petitioner until 6 August 1974 when he wrote complaining of the disparity of sentences given him and his codefendant.

It is submitted that *Santobello, supra.*, stands for the proposition that when a petitioner furnishes evidence that plea bargaining has taken place *and* that promises made to induce his plea were not kept, the Court must go behind the transcript of his plea of guilty, regardless of the inconsistency existing between his in-court declarations under oath and his subsequent statements.

It is submitted that Allison has been given ample opportunity to support his allegations of plea bargaining and to show that his plea was involuntarily induced by an unkept promise. Having failed in this regard, IT IS RECOMMENDED that an Order be entered dismissing his petition for rehearing.

Herman Amasa Smith
United States Magistrate

14 August 1974

PETITIONER'S MOTION FOR RECONSIDERATION FILED SEPTEMBER 9, 1974 IN U.S. DISTRICT COURT

(Caption omitted in printing)

Petitioner is in this court pursuant to Action, Re Case No. C-71-G-73, wherein the denial order issued in this case was received by petitioner August 16, 1974. In that circumstance, facts and issues have changed since the date of the order of denial and receipt of the same by petitioner, and for reasons set out further in this instant action, petitioner moves this court for process wherein reconsideration for order of denial will be Judicially litigated and upon the lawful conclusion thereof, issue orders upon the merits and legal premise:

1.

Petitioner reiterates the allegations set out in the original application for writ of habeas corpus in this action.

2.

Petitioner attaches hereto, making the exhibit a part of this instant action. Attached as exhibit A.

3.

Peitioner has had physical difficulties as this case progressed through process herein, in obtaining sworn statements from his Co-defendant, one Dana Eugene Lastee, due to the locations of incarceration of said Co-defendant, and mail difficulties, cumulating into a lack of communication.

4.

That upon the date, August 24, 1974, Petitioner was able to obtain a statement, supported by witnesse that a plea bargaining took place and that promise made to induce his plea, were not kept. See Exhibit A. Hereof, offered in support of allegations in this case.

WHEREFORE, petitioner having shown the court a valid basis for reconsideration of the order denying petitioner relief

as set out in the habeas corpus writ in this case, giving affidavit support to his allegations of plea bargaining and involuntary plea induced by unkept promise, petitioner demans justice, and moves this court to reconsider the allegations of this case as set out herein, granting petitioner relief as prayed for.

For this requested relief, and any or further relief deemed just by this court, petitioner will forever move and pray.

/s/ Gary Darrell Allison
Petitioner

(Verification omitted in printing)

ATTACHMENT TO MOTION FOR RECONSIDERATION FILED SEPTEMBER 9, 1974 IN U.S. DISTRICT COURT

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

BILL OF INFORMATION

I, Dana Eugene Laster, do swear that I was present when my co-defendant, Gary Darrell Allison and his attorney, Mr. Glen Pickard, were discussing entering a plea in court. I heard Mr. Pickard tell Mr. Allison, that if he would plead guilty to Attempted Safe Robery, he could "get him off", with 10 years. Mr. Pickard also told Mr. Allison that if he did not plead guilty, that the jury would find him guilty anyway because of his past record. Mr. Allison received 17 to 21 years while I only received 5 to 8 years for the same charge. Mr. Pickard also stated he had talked it over with the judge and prosecutor and they had agreed to 10 years. To the above statement, I affix my signature and swear before wittness that the same is true and factual to the best of my knowledge and belief.

/s/ Dana Eugene Laster
Co-Defendant

Wittnesses by:

Frank K. Griggs
Charles Thomas King
Paul Grimsley

This the 24th day of August, 1974.

COURT'S FINAL ORDER DENYING MOTION TO REOPEN FILED SEPTEMBER 26, 1974

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

GARY DARRELL ALLISON, Petitioner,	)	
v.	)	
DR. STANLEY BLACKLEDGE, Warden, Central Prison, Raleigh, N. C. and STATE OF NORTH CAROLINA, Respondents.	)	C-71-G-73

ORDER

GORDON, Chief Judge

By Memorandum Opinion and Order entered August 28, 1973, this Court denied state court prisoner Allison's application for a writ of habeas corpus. On September 4, 1973, he filed a petition for rehearing. On August 16, 1974, the action was ordered dismissed after the petitioner had been given several opportunities to file supporting documents.

On September 9, 1974, the petitioner filed again a motion for reconsideration.

The motion is denied and the action ORDERED closed. The Court notes that while his motion for reconsideration was notarized, the purported "Bill of Information" attached to the motion for consideration as an affidavit is simply an unnotarized statement by petitioner's co-defendant.

For the foregoing reasons, IT IS HEREBY ORDERED that the action be dismissed.

Eugene A. Gordon
United States District Judge

September 26, 1974

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT REVERSING DISTRICT COURT, FILED APRIL 13, 1976

This opinion is omitted from the Appendix, having been included in the Petition for Certiorari at pp. 23-32.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No. 75-1693

STANLEY BLACKLEDGE, Warden, Central Prison, and STATE OF NORTH CAROLINA,

Petitioners

v.

GARY DARRELL ALLISON,

Respondent

ON PETITION FOR CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

C. FRANK GOLDSMITH, JR.
STORY, HUNTER & GOLDSMITH, P.A.
P.O. Drawer 1330
Marion, North Carolina, 28752

Telephone No. (704)652-2844

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

No.

STANLEY BLACKLEDGE, Warden, Central Prison and STATE OF NORTH CAROLINA,

Petitioners

v.

GARY DARRELL ALLISON,

Respondent

ON PETITION FOR CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

ARGUMENT

I. THERE IS NO CONFLICT IN THE CIRCUITS OVER THE ISSUES INVOLVED IN THIS CASE.

Petitioners' claim of a conflict among the circuits is apparently based on the dissent by Judge Field in the Court below, for petitioners cite as authority that the "files and records" are conclusive the same four cases - and only those cases - cited by Judge Field in his footnote. Appendix E to Petition at 28 n 2. These cases do not demonstrate a present split in the circuits for several reasons. First of all, Judge

STORY, HUNTER & GOLDSMITH, P. A. ATTORNEYS AT LAW MARION, NORTH CAROLINA 28752

Field cited them solely to illustrate that Walters v. Harris, 460 F.2d 988 (4th Cir. 1972), at the time it was decided, placed the Fourth Circuit in conflict, in Judge Field's opinion, with four other circuits. However, Walters was decided in 1972, prior to this Court's decision in Fontaine v. United States, 411 U.S. 213 (1973), and Santobello v. New York, 404 U.S. 257 (1971). And each of the four cases cited by Judge Field, of course, also were decided prior to those two decisions.

Furthermore, Walters was a federal case involving Rule 11, as were each of the cases cited by petitioners. The present case, however, involves a claim by a prisoner in state custody arising out of his state court trial. If indeed there is a conflict among the circuits with respect to the effect to be given Rule 11 in a subsequent habeas corpus claim, the appropriate vehicle for resolving such a conflict would be a federal prisoner's appeal, not this one.

Finally, at least some of the circuits cited by petitioners as following the rule that the files and records are conclusive no longer adhere to that position. This is not surprising in view of the fact, as has been stated, that all are pre-Santobello and pre-Fontaine cases. For instance, Norman v. United States, 368 F.2d 645 (3d Cir. 1966), cited by petitioners, held that no hearing was required where the record revealed a particularly searching examination of defendant by the court as to his understanding and the voluntariness of his plea, and the absence of any allegation that his lawyer's assurances of a one-year sentence were supposedly backed by any assurances from the government or the court. Norman was followed by Moorhead v. United States, 456 F.2d 992 (3d Cir. 1972), and United States v. Hawthorne, 502 F.2d 1183 (3d Cir. 1974), both of which held that a hearing was required where the defendant claimed that his attorney had represented that there existed a pre-arranged agreement as to the sentence he would receive. Thus it is not exactly accurate to place the Third Circuit in the petitioners' so-called "conclusive" category.

Neither does the Fifth Circuit properly belong in that category. Pursley v. United States 391 F.29 224 (5th Cir. 1968), cited by petitioner, was followed by several cases holding that a defendant was not estopped to assert a broken plea bargain by his answers to the court's questions during the sentencing proceeding. See,e.g.,Gallegos v. Untied States, 466 F.2d 740 (5th Cir. 1972); Hilliard v. Beto, 465 F.2d 829 (5th Cir.), petition for rehearing en banc granted, 465 F.2d 833 (5th Cir. 1972), en banc panel dissolved and case remanded to panel, 494 F.2d 34 (5th Cir.) remanded for evidentiary hearing, 494 F.2d 35 (5th Cir. 1974); United States v. Gonzalez-Hernandez, 481 F. 2d 650 (5th Cir. 1973). Compare Bryan v. United States, 492 F.2d 775 (5th Cir. 1974), and Frank v. United States 501 F.2d 173 (5th Cir. 1974).

Petitioners' authority from the Sixth Circuit, United States v. Davis, 319 F.2d 482 (6th Cir. 1963), was followed a scant two years later (even prior to Fontaine and Santobello) by Scott v. United States, 349 F.2d 641 (6th Cir. 1965). There the court held that affidavits filed by the government to counter the defendant's claim of plea inducement could not be regarded as conclusive; the court further remarked that it could not read the colloquy at sentencing as providing a definite rebuttal to petitioner's present claims of inducement. The case

STORY, HUNTER & GOLDSMITH, P. A.
ATTORNEYS AT LAW
MARION, NORTH CAROLINA
28752

stands for the proposition that the Sixth Circuit does not automatically make the files and records conclusive.

As for the Tenth Circuit, the last cited by the petitioners as being in conflict with the Fourth on the issues involved herein, the authority cited is Putnam v. United States, 337 F.2d 313 (10th Cir. 1964). There the defendant, charged with transportation of a stolen motor vehicle from Canada to New Mexico, pled guilty and was sentenced to eighteen months. He alleged, in a motion to vacate his sentence under Section 2255, that he was induced to change his plea to guilty by the promises of, or a misunderstanding with, his court-appointed attorney to the effect that he would be deported to Canada but would not be imprisoned. In fact, the record in the case showed that he made a request in open court that any sentence be suspended because of his understanding that he would be immediately deported, but, held the court, the record also very clearly showed that it was only a request, and the trial court thoroughly inquired into whether defendant was in fact guilty and understood that he was. The court therefore held that no factual issues were raised by defendant's motion and that the files and records showed conclusively that his plea was entered voluntarily and knowingly. The case, aside from its age, is easily distinguishable from factual situations such as respondent's, who alleged an off-the-record plea bargain with the state.

Thus the supposed conflict among the circuits evaporates; the Fourth Circuit, in rendering the decision below, was following well-established authority, which was more thoroughly developed in respondent's brief to the Fourth Circuit. Petitioners have not cited, and respondent has been unable to find, any decision involving materially similar facts in conflict with the decision

STORY, HUNTER & GOLDSMITH, P. A.
ATTORNEYS AT LAW
MARION, NORTH CAROLINA
28752

below.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

Petitioners assert that the decision in respondent's favor conflicts with Machibroda v. United States, 368 U.S. 487 (1962); Townsend v. Sain, 372 U.S. 293 (1963); and Fontaine v. United States, 411 U.S. 213 (1973). The asserted conflict is difficult for respondent to perceive, since all three of the cited cases were decisions in favor of prisoners in habeas corpus actions. Machibroda affirmed the basic rule, which the court below followed, that a guilty plea induced by a promise of a certain minimum sentence is void, and the resulting conviction may be attacked collaterally in an evidentiary hearing. Townsend established the standards by which federal courts are guided in determining whether to grant an evidentiary hearing to state prisoners in habeas corpus, holding that a hearing must be held if the applicant did not receive a full and fair evidentiary hearing in a state court (which the respondent here did not). Fontaine stands for the proposition that a record showing compliance with Rule 11 is evidence of voluntariness, but is not conclusive, and that the existence of such a record is not a per se bar to collateral attack. The court held that the objective of Rule 11 is "to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations." 411 U.S. at 215 (per curiam opinion).

Clearly the Fourth Circuit in the decision below was following, not defying, the law established by this Court, and manifestly its holding was correct.

STORY, HUNTER & GOLDSMITH, P. A.
ATTORNEYS AT LAW
MARION, NORTH CAROLINA
28752

CONCLUSION

Petitioners have failed to demonstrate that the Fourth Circuit, because of its decision in this case, is "on the wrong side of the split in authority in the circuits," as they allege, or that the decision below is at variance with decisions of this Court. Indeed, respondent submits that the case is of little significance to anyone other than respondent himself, and it is not worthy of further attention by this Court. It is therefore respectfully suggested that the petition for certiorari be denied.

Respectfully submitted,

C. Frank Goldsmith, Jr.
C. FRANK GOLDSMITH, JR.

Attorney for Respondent

STORY, HUNTER & GOLDSMITH, P.A.
P.O. Drawer 1330
Marion, N.C., 28752

Telephone (704)652-2844

CERTIFICATE OF SERVICE

This is to certify that I have this date served counsel for the opposing party in the foregoing matter with a copy of this Brief by
(X) by depositing in the United States Mail a copy of the same in a properly addressed envelope with adequate postage thereon.
( ) by delivering a copy of the same to the office or place of business of said counsel.

This the 25 day of June, 1976.

STORY, HUNTER & GOLDSMITH, P. A.

BY: C. F. Goldsmith, Jr.

Attorneys at Law
P. O. Drawer 1330
Marion, N. C., 28752
(704) 652-2844

STORY, HUNTER
& GOLDSMITH, P. A.
ATTORNEYS AT LAW
MARION, NORTH CAROLINA
28752

IN THE

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,

Petitioners,

v.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

RUFUS L. EDMISTEN
Attorney General of North Carolina

RICHARD N. LEAGUE
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7387

COUNSEL FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

IN THE

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,
Petitioners,

v.

GARY DARRELL ALLISON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, filed April 13, 1976, is reported as *Allison v. Blackledge*, 537 F2d 894 (4 Cir 1976), and is printed as Appendix E in the Petition for Certiorari, pp. 23-32.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1), by writ of certiorari sought by a party to a civil case after rendition of judgment. The petition was filed May

22, 1976, within the statutory ninety days from decision in the Court below, April 13, 1976.

QUESTION PRESENTED

I. WHETHER A UNITED STATES DISTRICT COURT HAS THE DISCRETION TO DENY A PRISONER'S HABEAS CORPUS PETITION WITHOUT A HEARING WHEN HIS CLAIM FOR RELIEF IS THAT HIS ATTORNEY PROMISED A LOWER SENTENCE UPON HIS GUILTY PLEA THAN HE RECEIVED, BUT THIS CLAIM IS CONTRADICTED BY A STATE COURT FINDING OF FACT BASED ON PETITIONER'S OWN TESTIMONY AT THE TIME OF HIS PLEA THAT HIS ATTORNEY PROMISED HIM NOTHING FOR IT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

U.S. Constitution, Article XIV:

"No state . . . shall . . . deprive any person of life, liberty or property, without due process of law."

28 USC §2246:

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

28 USC §2254 (f):

"In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a

hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectivly set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 USC §2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or

grant a new trial or correct the sentence as may appear appropriate."

****

STATEMENT OF THE CASE

A. Procedural History

This case began with the filing of a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, Greensboro, North Carolina on February 15, 1973. In that petition, Gary Darrell Allison made three claims for relief: his attorney had promised him a lesser sentence if he pled guilty than he received when he did so; he was not advised of his right to appeal; and he did not receive a post-conviction hearing. The State responded that his first contention was refuted by his testimony at the time of his plea; that he had no right to advice on an appeal because he pled guilty; and that the absence of a post-conviction hearing was not a ground for relief in habeas corpus. The case was finally dismissed without a hearing on August 16, 1974 for the failure of the petitioner to produce certain affidavits in support of his claim. Allison then appealed to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, and the case was briefed and argued with court-appointed counsel, C. Frank Goldsmith, Esquire, of Marion, North Carolina, appearing on behalf of petitioner. Before the Fourth Circuit, Allison contended the allegation about his sentence stated a claim which if true, would entitle him to relief; he was entitled to a hearing on it; and the direction of the Court to him, during the pendency of the proceedings, to supplement his petition with affidavits was error. The State argued no significant state action was involved in Allison's claim; an adequate state hearing had been held at trial, the results of which could be accepted by the Court; and the Court's action in attempting to obtain affidavits from him was authorized and reasonable. On April 13, 1976, the Court of Appeals ruled in

Allison's favor, holding he was entitled to a hearing and that the District Court acted improperly in seeking affidavits. A writ of certiorari from this Honorable Court was sought by Warden Blackledge and the State of North Carolina on May 27, 1976, and granted on October 4, 1976.

B. Facts Underlying the Question Presented

On January 24, 1972, in the Superior Court of Almance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). At this time, he was represented by counsel, Glenn Pickard, Esquire. Before Judge Blount accepted Allison's plea, he placed Allison under oath and asked him some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions appeared on a form entitled "Transcript of Plea" (App p11, 12) and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison acknowledged, among other things, that he was guilty and that he understood that he could be imprisoned from ten years to life as a result of his plea; and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. At the end of this proceeding, he also stated that he had no further statements or any questions, and signed a form recording the above answers.[1] On the basis of the overall inquiry, a number of findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty one years (App p 14). He did not appeal.

1. Allison's commitment states that he did address the bench at some point, however, the undersigned was informed by the court reporter that this was not transcribed and so its content has never been before any of the courts considering this matter.

Thereafter, Allison began his collateral attack in the courts of the State of North Carolina, and having unsuccessfully exhausted his state remedies there, he applied for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina on or about February 15, 1973. With regard to the issue before this Honorable Court, he alleged that this plea of guilty to the charge of attempted safe robbery was the result of the following episode:

> "The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel." (App p 2, 3)

In reviewing Allison's application, Honorable Eugene A. Gordon, Chief Judge found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea and impliedly Judge Gordon accepted this examination in lieu of a further hearing on the matter. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation by counsel about a sentence. Therefore, he dismissed the application without evidentiary hearing (App p 15). Allison sought a reconsideration, (App p 17) whereupon Magistrate Herman A. Smith then characterized the allegation as one of an "unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit in support of this claim by the witness he had original-

ly mentioned (App p 19-20). Instead of doing this, Allison sent a letter on or about May 13, 1974, saying that his witness was unable to get his statement notarized (App p 25). He was then informed that the superintendent of the prison unit in which his witness was incarcerated was a notary (App p 26). Thereafter, Allison followed this on or about May 17, 1974, saying that his mother had written him that papers had been notarized but were then torn up by the notary (App p 22). This was interpreted by the District Court as suggesting state interference with his right to access to the courts for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness, with that statement to include a recitation of his attempts to get his paper notarized (App p 23). Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release." (App p 24). On August 16, 1974, Judge Gordon again dismissed his application (App p 25, 26). Allison then sent to the court an unsworn statement to which his co-defendant's name was signed, witnessed by three persons without designation, again seeking reconsideration of the judge's second order (App p 28-30). Nothing was said in the statement forwarded about state interference with the witness' access to the courts, and Allison did not send an affidavit from his mother with it. Reconsideration was therefore declined by Judge Gordon who noted in passing that petitioner's pleadings had been notarized (App p 31).

SUMMARY OF ARGUMENT

Allison's plea proceeding was a thorough one, which provided findings of fact that the District Court should have and did use in coming to its decision on whether or not to grant Allison a hearing on his allegation that his lawyer promised him a lower sentence than he received on his plea of guilty. The District Court's tentative decision to re-open the case if there was independent support for Allison's claim was suggested by decisions of this Honorable Court and other courts, and its method of handling the initial showing by affidavit was entirely proper. On the other hand, the Court of Appeals decision reversing the District Court is based on an inconsequential factor. Moreover, the basis of its decision runs counter to general experience, and the decision itself places an undue burden on the government in light of the circumstances alleged, disregards equitable considerations, and overlooks a substantial motivation underlying the filing of petitions. Therefore, the Court of Appeals should be reversed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO HEAR ANEW THE MATTER OF PROMISES FOR ALLISON'S PLEA WHEN HE OFFERED NO SUBSTANTIATION OF HIS CLAIM.

The District Court properly handled Allison's application for the writ when it re-opened his case. Accordingly, the Court of Appeals erred in reversing the District Court and should itself be reversed by this Honorable Court for the reasons which follow.

Allison presented an application to the District Court which alleged his lawyer told him that if he pled guilty, he would receive a sentence of ten years, and that he had been led to believe that this had been cleared with the judge and the solicitor by his lawyer. When the return of the writ was made, however, the transcript of plea showed Allison had sworn under oath at trial that no promises had been made to him by anyone to influence his plea and that he knew he could get as much as life imprisonment on the charge. Therefore, taking the application and the transcript together, Allison's assertion indicated he

had lied at trial. The District Court's reaction to this was to try to have him corroborate his claim before committing trial time to it. Due to the fact that Allison said that the alleged misrepresentation by his lawyer was witnessed, the Court told him to get an affidavit from this witness to attach to his application. The affidavit never came however, and after the Court had been given the run-around three times, it properly dismissed the action.

The District Court's basis for dismissal was the failure of petitioner to substantiate his claim of plea bargaining and its breach, *i.e.*, the failure to tender new evidence to the Court. This was a permissible approach for the District Court to take because, absent such evidence, all the Court had before it was a state court finding from Allison's plea proceeding which belied his claim. This state court finding was properly relied on since such determinations are presumed correct and ordinarily should be utilized by the federal judiciary in deciding habeas corpus cases, 28 USC §2254(d), *Townsend v. Sain*, 372 US 293 (1963), provided the hearing was a reliable one. The reliability of Allison's plea proceeding cannot be faulted. He was represented by counsel at the time he was tried, and the trial judge took great pains to determine that Allison's plea was a constitutionally valid one. In accordance with normal North Carolina procedure, Allison was sworn and first questioned on his mental competency. Then he was queried on his understanding of the charges against him. Next Judge Blount asked him about his understanding of the pleas available and the possible maximum sentence. When it was determined that he wished to plead guilty, Allison was questioned about his guilt, his trial preparedness, whether or not he was pleading on account of promises, and whether his plea was voluntary or coerced. Finally, he was afforded allocution, but evidently declined it at that time. None of Allison's answers to any of the questions indicated there was anything amiss with regard to his plea. Therefore, no additional questions

were asked him to amplify his responses about any of the areas touched upon. Instead, as a result of Allison's sworn testimony, it appeared to Judge Blount that Allison knew he might get as much as life imprisonment and that no one had made him any promises for his plea. Accordingly, the judge concluded the plea was not induced by any promise of leniency, and on the basis of Allison's other sworn testimony, Judge Blount found the plea was entered understandingly and voluntarily. These conclusions covered the necessary matters of mental competence, *Drope v. Missouri*, 420 US 162 (1975); effective assistance of counsel, *McMann v. Richardson*, 397 US 759 (1970), including knowledgeable forfeiture of trial rights, *Boykin v. Alabama*, 395 US 238 (1969); and the absence of any physical or mental mistreatment or threats of same, *Brady v. United States*, 397 US 742 (1970). In addition, these conclusion determined the absence of any plea bargain to be enforced or misrepresentation by counsel to be uncovered. Therefore, because of both the overall completeness of Allison's at-trial hearing and its coverage of the matter in issue here, it provided findings which the District Court should have accepted in lieu of further hearing under *Townsend v. Sain*, *infra*, and which it had to presume correct under 28 USC §2254. Accordingly, its dismissal was justified on this basis, nothing else appearing, even though the District Court did not expressly rely on the findings from the plea proceeding in so many words.

The District Court also utilized authorized procedures in dealing with Allison prior to rightly dismissing his case on the basis above. It exercised its *Townsend*-authorized discretion in handling the matter by seeking out an initial showing of new evidence before reconsidering the merits of the case. This had been previously suggested as a basis for re-hearing by Part III of *Townsend v. Sain*, 372 US 293, 788 (1963), where there was no "inexcusable neglect" and was the factor on which main reliance was placed by this Honorable Court when authorizing a hearing in *Fontaine v. United States*, 411 US

213 1973. The District Court sought the showing by way of affidavit—a suggested preliminary technique in the Fourth Circuit before this case, *Raines v. United States*, 423 F2d 526 (4 Cir 1970); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); and since this case, *Tabory v. United States*, ... F2d ... (75-1081, Sep. 22, 1976); a technique suggested in other circuits as well, *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974); and a technique authorized for taking evidence on the merits of the case under 28 USC §2246. Accordingly, when the new evidence Allison said existed was not forthcoming, and he made suspicious excuses for not producing some indication of it, the reliance the District Court should have placed on state court findings was significantly enhanced, and its decision to again dismiss the case rested on even a firmer ground than before.

The propriety of the District Court's action in both of the above regards is confirmed by a survey of the modern precedents on the problems of granting hearings on allegations of misrepresentation by counsel or broken plea bargains.[2] This history begins with *Machibroda v. United States*, 368 US 487 (1962). In that case, Machibroda had been convicted and sentenced without a Rule 11 inquiry to determine if his plea was freely made and if it was in exchange for any concessions

2. These phrases are two of several which describe sub-groups of cases within the general area of pleas induced by certain expectations. The first group of cases involves a prediction by an attorney as to sentence or other action upon a guilty plea. When this does not pan out, it is generally held not to be a basis for setting a plea aside. An occasional case also deals with pleas induced by predictions by government personnel, with relief being allowed under the "mistake of fact" recission doctrine. Another sub-group of cases involves unfulfilled assurances by counsel that if a plea is made, certain things will come to pass, without the assurance including any mention of the government as having promised them. A fourth group involves alleged unkept assurances by counsel that the government has promised something for his plea. The final group involves alleged unkept assurances made to the defendant personally by the government, with or without the presence of his counsel.

from the government. He later attacked it in a motion accompanied by a nineteen paragraph affidavit, detailing the particulars, persons, places and times involved in the alleged episodes of plea bargaining and coercion. This was dismissed without a hearing in the District Court and its decision was affirmed by the Court of Appeals. However, this Honorable Court reversed on the grounds that 28 USC §2255 required a hearing because the motion, files and records of the case did not "conclusively" show that the prisoner was entitled to no relief. Although the majority opinion described the *Machibroda* case as "marginal" and " not far from the line", the Court was impressed by the fact that the record showed nothing on the matter and the affidavit about it was detailed. The importance of detail and supporting material has recently been re-affirmed by this Honorable Court's decision in *Fontaine v. United States*, 411 US 213 (1973), dealing with a different context—mental competence. In that case, hospital records were tendered in support of Fontaine's claims and showed hospitalization a month following his plea for heroin addiction, and other severe injury and illness. Once again, this Honorable Court held that the 28 USC §2255 standard of conclusiveness was not met when this material was compared with the evidence taken at the Rule 11 plea proceeding (not set out in the opinion). This differs from the ordinary case such as Allison's and this difference has been impressively stated by Judge Clark of the Fifth Circuit, writing for the majority in the *en banc* decision in *Bryan v. United States*, 492 F2d 775 (5 Cir 1974):

> ". . . The record of the plea proceedings in the case at bar reflects that both Bryan and his attorney testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly.[3] No such testimony appeared in the files and records developed in Fon-

3. Allison's case differs from Bryan's in that Allison's lawyer evidently made no representations to the court at trial about the absence of promises.

taine and Machibroda. In neither of these cases had petitioner and his attorney been required to testify in open court as to whether a bargain had been struck. In neither case did explicit denials of plea bargains appear as a part of a duly recorded court proceeding record. To the contrary, not only was the subject of plea bargaining entirely absent from Fontaine's record but also those documents disclosed that he did not even have an attorney. The Machibroda record shows that the only person permitted to speak at the time of his sentencing was the attorney from whom knowledge of the alleged plea bargain had assertedly been withheld.

It is one thing to hold that petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of an unraised fact, but the utterly incredible assertion that all former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself.

****

The Supreme Court said that Machibroda was 'not far from the line'. This case is way over it." *Id.* at 780.

Therefore, in light of these precedents, the District Court's disposition was clearly correct.[4]

---

4. In addition to Allison's claim, like Bryan's, having been contradicted, an additional factor weighs against a hearing for him that is not present in *Bryan* or most of the other cases which follow. As Allison was a state prisoner, the standard of conclusiveness was inapplicable to the prior proceeding concerning him, since that standard appears only in 28 USC §2255 dealing with federal prisoners, not in 28 USC §2254, dealing with state prisoners. Therefore, prior proceedings concerning Allison are not gauged with the same stringency as those of Bryan and other federal prisoners.

The District Court's decision is also supported by an analysis of post *Machibroda* authority. The majority of cases show heed paid to the salient facts in *Machibroda* and rulings made accordingly. For example, where an allegation of misrepresentation by counsel or a broken plea bargain by government has been made, and there evidently has been no disclaimer of promises at the time of a plea, a hearing has been directed, *Scott v. United States*, 349 F2d 641 (6 Cir 1965); *Del Piano v. United States*, 362 F2d 931 (3 Cir 1966); *Reed v. United States*, 441 F2d 569 (9 Cir 1971); *Shoultz v. Hocker*, 469 F2d 681 (9 Cir 1971) (state case); *United States v. Battle*, 447 F2d 950 (5 Cir 1971); *Micklus v. United States*, 537 F2d 381 (9 Cir 1976), although the aspect of detail in alleging the episode has not been critically dealt with except in the *Scott* and *Micklus* cases. On the other hand, where a misrepresentation by counsel or a broken plea bargain by government is alleged by one who has previously told the court that he has received no promises for his plea, some cases have held that files and records meet the statutory "conclusive" standard on this account alone, *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964); *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *Rosado v. United States*, 510 F2d 1098 (5 Cir 1975). Still other cases have reached the same result on the basis of an at-trial disclaimer of promises without employing a form of the statutory term, conclusiveness, *Lynott v. United States*, 360 F2d 586 (3 Cir 1966); *Alvereze v. United States*, 427 F2d 1150 (5 Cir 1970); *Moody v. United States* 497 F2d 359 (7 Cir 1974); *Frank v. United States*, 501 F2d 173 (5 Cir 1974). Yet another group of cases came to this result in partial reliance on other noteworthy factors as well as the disclaimer of promises, *Olive v. United States*, 327 F2d 646 (6 Cir 1964) (failure to use opportunity to speak plus conclusory allegations); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (failure to speak at previous opportunity plus experience in criminal prosecu-

tions); *Earley v. United States*, 381 F2d 715 (9 Cir 1967) (meticulous overall examination on plea plus conclusory allegation); *United States v. Tweedy*, 419 F2d 192 (9 Cir 1969) (failure to mention complaint when writing the judge three letters); *United States v. Frontero*, 452 F2d 406 (5 Cir 1971) (lawyer's statement inconsistent with claim plus conclusory allegation); *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (lawyer's statement inconsistent with claim); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974) (failure to mention the complaints when writing the judge plus delay of two years in complaining); *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) (use of the words "plea bargain" in examining the accused). The decisions in each of last three groups above support the District Court's dismissal and show that its ultimate disposition of the case was proper.

The District Court's approach, as well as its decision is supported by another group of post *Machibroda* precedents—cases like *Machibroda* and *Fontaine* in which a hearing was ordered. In this group of cases, there has been some independent basis for re-examining the plea proceedings beyond the word of the prisoner. In *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974) and *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971) (state case), the record itself showed the incomplete resolution of the conflicts concerning the existence of plea bargaining. In *Hilliard v. Beto*, 465 F2d 829 (5 Cir 1972) (state case), the record showed a substantial reason to lie in that the judge would not accept a bargained plea and Hilliard faced death if his plea were unaccepted. In *Roberts v. United States*, 486 F2d 980 (5 Cir 1973) and *Dugan v. United States*, 521 F2d 231 (5 Cir 1975), the record was supplemented by substantial corroboration in the form of affidavits, some from apparently reliable third parties. Each of the above, like the intended yield of the District Court's efforts, bears some resemblance to one of the bases for re-hearing set out in *Townsend v. Sain*, 372 US 293 (1963). Accordingly, they demonstrate the propriety of the District Court's dismissal in

the absence of some comparable factor in Allison's case.

The Court of Appeals attached significance to an inference from the allegations in this case that Allison's "no promises" statement was part of a cover-up in which he was told to lie to get his plea accepted. Mention of this factor has been made in other cases, *United States v. Tweedy*, 419 F2d 192 (1969); *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Roberts v. United States*, 486 F2d 980 (5 Cir 1973); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974); *Bass v. United States*, 529 F2d 1374 (4 Cir 1975). However, it adds nothing to the basic contention and should have no significance as the pleading factor. It would be the expected explanation for an allegedly false answer, and the only possible one except for an unreal degree of inattentiveness or reckless disregard. Even with this additional allegation, the claim remains one of either ineffective assistance of counsel or of fundamental unfairness, or both, depending on who supposedly procured the prisoner's perjury; and, like the basic allegation, is belied by the transcript in that it runs counter to the oath. In writing the opinion in *Bryan v. United States*, 492 F2d 775 (1974), Judge Clark pointed out the pitfall involved in using this additional factor as a basis for a hearing:

> "It is one thing to hold that a petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of a unraised fact, but the utterly incredible assertion that all the former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectivly set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

28 USC §2255:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or

grant a new trial or correct the sentence as may appear appropriate."

****

STATEMENT OF THE CASE

A. Procedural History

This case began with the filing of a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina, Greensboro, North Carolina on February 15, 1973. In that petition, Gary Darrell Allison made three claims for relief: his attorney had promised him a lesser sentence if he pled guilty than he received when he did so; he was not advised of his right to appeal; and he did not receive a post-conviction hearing. The State responded that his first contention was refuted by his testimony at the time of his plea; that he had no right to advice on an appeal because he pled guilty; and that the absence of a post-conviction hearing was not a ground for relief in habeas corpus. The case was finally dismissed without a hearing on August 16, 1974 for the failure of the petitioner to produce certain affidavits in support of his claim. Allison then appealed to the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, and the case was briefed and argued with court-appointed counsel, C. Frank Goldsmith, Esquire, of Marion, North Carolina, appearing on behalf of petitioner. Before the Fourth Circuit, Allison contended the allegation about his sentence stated a claim which if true, would entitle him to relief; he was entitled to a hearing on it; and the direction of the Court to him, during the pendency of the proceedings, to supplement his petition with affidavits was error. The State argued no significant state action was involved in Allison's claim; an adequate state hearing had been held at trial, the results of which could be accepted by the Court; and the Court's action in attempting to obtain affidavits from him was authorized and reasonable. On April 13, 1976, the Court of Appeals ruled in

Allison's favor, holding he was entitled to a hearing and that the District Court acted improperly in seeking affidavits. A writ of certiorari from this Honorable Court was sought by Warden Blackledge and the State of North Carolina on May 27, 1976, and granted on October 4, 1976.

B. Facts Underlying the Question Presented

On January 24, 1972, in the Superior Court of Almance County, North Carolina, Honorable Marvin Blount, Jr., Judge Presiding, Gary Darrell Allison entered a plea of guilty in case number 71 CRS 15073, in which he was charged with attempted safe robbery ("safecracking"). At this time, he was represented by counsel, Glenn Pickard, Esquire. Before Judge Blount accepted Allison's plea, he placed Allison under oath and asked him some fourteen questions in accordance with a formalized North Carolina procedure in order to determine whether or not his plea was an intelligent, knowing and voluntary act. These questions appeared on a form entitled "Transcript of Plea" (App p11, 12) and covered the matters of defendant's mental capacity, his understanding of the charge and its penalty, his understanding of the right to plead not guilty and have a jury trial, a canvass of possible motivations for his plea, and a canvass of his ability to prepare a defense. In response to these questions, Allison acknowledged, among other things, that he was guilty and that he understood that he could be imprisoned from ten years to life as a result of his plea; and stated that no one had made any promise or threat to him to influence him to plead guilty in this case. At the end of this proceeding, he also stated that he had no further statements or any questions, and signed a form recording the above answers.[1] On the basis of the overall inquiry, a number of findings were made, including one that "the plea of guilty by the defendant is freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency" and the plea was accepted. Allison was sentenced to imprisonment for a period of from seventeen to twenty one years (App p 14). He did not appeal.

1. Allison's commitment states that he did address the bench at some point, however, the undersigned was informed by the court reporter that this was not transcribed and so its content has never been before any of the courts considering this matter.

Thereafter, Allison began his collateral attack in the courts of the State of North Carolina, and having unsuccessfully exhausted his state remedies there, he applied for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina on or about February 15, 1973. With regard to the issue before this Honorable Court, he alleged that this plea of guilty to the charge of attempted safe robbery was the result of the following episode:

> "The petitioner was led to believe and did believe, by Mr. Pickard, that he, Mr. M. Glenn Pickard, had talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [*sic*] guilty, that he would only get a ten year sentence of penal servitude. This conversation, where the petitioner was assured that if he plea [*sic*] guilty, he would only get ten years was witnessed by another party other than the petitioner and counsel." (App p 2, 3)

In reviewing Allison's application, Honorable Eugene A. Gordon, Chief Judge found that the transcript of plea taken by Judge Blount at trial showed a careful examination prior to acceptance of Allison's plea and impliedly Judge Gordon accepted this examination in lieu of a further hearing on the matter. He also construed the allegation to be one concerning only a prediction of sentence, rather than an allegation of a broken plea bargain or a misrepresentation by counsel about a sentence. Therefore, he dismissed the application without evidentiary hearing (App p 15). Allison sought a reconsideration, (App p 17) whereupon Magistrate Herman A. Smith then characterized the allegation as one of an "unkept promise" and entered an order on April 25, 1974, directing Allison to file an affidavit in support of this claim by the witness he had original-

ly mentioned (App p 19-20). Instead of doing this, Allison sent a letter on or about May 13, 1974, saying that his witness was unable to get his statement notarized (App p 25). He was then informed that the superintendent of the prison unit in which his witness was incarcerated was a notary (App p 26). Thereafter, Allison followed this on or about May 17, 1974, saying that his mother had written him that papers had been notarized but were then torn up by the notary (App p 22). This was interpreted by the District Court as suggesting state interference with his right to access to the courts for the Clerk then suggested that Allison have his mother swear to this by affidavit and get an unsworn statement from the witness, with that statement to include a recitation of his attempts to get his paper notarized (App p 23). Neither were forthcoming. Instead, two and one-half months later, Allison wrote to the court complaining of disparity in sentences between him and his co-defendant, and stating he had heard through his people "that the statement my co-defendant was supposed to make was not made because he is afraid of his parole and work release." (App p 24). On August 16, 1974, Judge Gordon again dismissed his application (App p 25, 26). Allison then sent to the court an unsworn statement to which his co-defendant's name was signed, witnessed by three persons without designation, again seeking reconsideration of the judge's second order (App p 28-30). Nothing was said in the statement forwarded about state interference with the witness' access to the courts, and Allison did not send an affidavit from his mother with it. Reconsideration was therefore declined by Judge Gordon who noted in passing that petitioner's pleadings had been notarized (App p 31).

SUMMARY OF ARGUMENT

Allison's plea proceeding was a thorough one, which provided findings of fact that the District Court should have and did use in coming to its decision on whether or not to grant Allison a hearing on his allegation that his lawyer promised him a lower sentence than he received on his plea of guilty. The District Court's tentative decision to re-open the case if there was independent support for Allison's claim was suggested by decisions of this Honorable Court and other courts, and its method of handling the initial showing by affidavit was entirely proper. On the other hand, the Court of Appeals decision reversing the District Court is based on an inconsequential factor. Moreover, the basis of its decision runs counter to general experience, and the decision itself places an undue burden on the government in light of the circumstances alleged, disregards equitable considerations, and overlooks a substantial motivation underlying the filing of petitions. Therefore, the Court of Appeals should be reversed.

ARGUMENT

I

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO HEAR ANEW THE MATTER OF PROMISES FOR ALLISON'S PLEA WHEN HE OFFERED NO SUBSTANTIATION OF HIS CLAIM.

The District Court properly handled Allison's application for the writ when it re-opened his case. Accordingly, the Court of Appeals erred in reversing the District Court and should itself be reversed by this Honorable Court for the reasons which follow.

Allison presented an application to the District Court which alleged his lawyer told him that if he pled guilty, he would receive a sentence of ten years, and that he had been led to believe that this had been cleared with the judge and the solicitor by his lawyer. When the return of the writ was made, however, the transcript of plea showed Allison had sworn under oath at trial that no promises had been made to him by anyone to influence his plea and that he knew he could get as much as life imprisonment on the charge. Therefore, taking the application and the transcript together, Allison's assertion indicated he

had lied at trial. The District Court's reaction to this was to try to have him corroborate his claim before committing trial time to it. Due to the fact that Allison said that the alleged misrepresentation by his lawyer was witnessed, the Court told him to get an affidavit from this witness to attach to his application. The affidavit never came however, and after the Court had been given the run-around three times, it properly dismissed the action.

The District Court's basis for dismissal was the failure of petitioner to substantiate his claim of plea bargaining and its breach, *i.e.*, the failure to tender new evidence to the Court. This was a permissible approach for the District Court to take because, absent such evidence, all the Court had before it was a state court finding from Allison's plea proceeding which belied his claim. This state court finding was properly relied on since such determinations are presumed correct and ordinarily should be utilized by the federal judiciary in deciding habeas corpus cases, 28 USC §2254(d), *Townsend v. Sain*, 372 US 293 (1963), provided the hearing was a reliable one. The reliability of Allison's plea proceeding cannot be faulted. He was represented by counsel at the time he was tried, and the trial judge took great pains to determine that Allison's plea was a constitutionally valid one. In accordance with normal North Carolina procedure, Allison was sworn and first questioned on his mental competency. Then he was queried on his understanding of the charges against him. Next Judge Blount asked him about his understanding of the pleas available and the possible maximum sentence. When it was determined that he wished to plead guilty, Allison was questioned about his guilt, his trial preparedness, whether or not he was pleading on account of promises, and whether his plea was voluntary or coerced. Finally, he was afforded allocution, but evidently declined it at that time. None of Allison's answers to any of the questions indicated there was anything amiss with regard to his plea. Therefore, no additional questions

were asked him to amplify his responses about any of the areas touched upon. Instead, as a result of Allison's sworn testimony, it appeared to Judge Blount that Allison knew he might get as much as life imprisonment and that no one had made him any promises for his plea. Accordingly, the judge concluded the plea was not induced by any promise of leniency, and on the basis of Allison's other sworn testimony, Judge Blount found the plea was entered understandingly and voluntarily. These conclusions covered the necessary matters of mental competence, *Drope v. Missouri*, 420 US 162 (1975); effective assistance of counsel, *McMann v. Richardson*, 397 US 759 (1970), including knowledgeable forfeiture of trial rights, *Boykin v. Alabama*, 395 US 238 (1969); and the absence of any physical or mental mistreatment or threats of same, *Brady v. United States*, 397 US 742 (1970). In addition, these conclusion determined the absence of any plea bargain to be enforced or misrepresentation by counsel to be uncovered. Therefore, because of both the overall completeness of Allison's at-trial hearing and its coverage of the matter in issue here, it provided findings which the District Court should have accepted in lieu of further hearing under *Townsend v. Sain, infra*, and which it had to presume correct under 28 USC §2254. Accordingly, its dismissal was justified on this basis, nothing else appearing, even though the District Court did not expressly rely on the findings from the plea proceeding in so many words.

The District Court also utilized authorized procedures in dealing with Allison prior to rightly dismissing his case on the basis above. It exercised its *Townsend*-authorized discretion in handling the matter by seeking out an initial showing of new evidence before reconsidering the merits of the case. This had been previously suggested as a basis for re-hearing by Part III of *Townsend v. Sain*, 372 US 293, 788 (1963), where there was no "inexcusable neglect" and was the factor on which main reliance was placed by this Honorable Court when authorizing a hearing in *Fontaine v. United States*, 411 US

213 1973. The District Court sought the showing by way of affidavit—a suggested preliminary technique in the Fourth Circuit before this case, *Raines v. United States*, 423 F2d 526 (4 Cir 1970); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); and since this case, *Tabory v. United States*, ___ F2d ___ (75-1081, Sep. 22, 1976); a technique suggested in other circuits as well, *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974); and a technique authorized for taking evidence on the merits of the case under 28 USC §2246. Accordingly, when the new evidence Allison said existed was not forthcoming, and he made suspicious excuses for not producing some indication of it, the reliance the District Court should have placed on state court findings was significantly enhanced, and its decision to again dismiss the case rested on even a firmer ground than before.

The propriety of the District Court's action in both of the above regards is confirmed by a survey of the modern precedents on the problems of granting hearings on allegations of misrepresentation by counsel or broken plea bargains.[2] This history begins with *Machibroda v. United States*, 368 US 487 (1962). In that case, Machibroda had been convicted and sentenced without a Rule 11 inquiry to determine if his plea was freely made and if it was in exchange for any concessions

2. These phrases are two of several which describe sub-groups of cases within the general area of pleas induced by certain expectations. The first group of cases involves a prediction by an attorney as to sentence or other action upon a guilty plea. When this does not pan out, it is generally held not to be a basis for setting a plea aside. An occasional case also deals with pleas induced by predictions by government personnel, with relief being allowed under the "mistake of fact" recission doctrine. Another sub-group of cases involves unfulfilled assurances by counsel that if a plea is made, certain things will come to pass, without the assurance including any mention of the government as having promised them. A fourth group involves alleged unkept assurances by counsel that the government has promised something for his plea. The final group involves alleged unkept assurances made to the defendant personally by the government, with or without the presence of his counsel.

from the government. He later attacked it in a motion accompanied by a nineteen paragraph affidavit, detailing the particulars, persons, places and times involved in the alleged episodes of plea bargaining and coercion. This was dismissed without a hearing in the District Court and its decision was affirmed by the Court of Appeals. However, this Honorable Court reversed on the grounds that 28 USC §2255 required a hearing because the motion, files and records of the case did not "conclusively" show that the prisoner was entitled to no relief. Although the majority opinion described the *Machibroda* case as "marginal" and " not far from the line", the Court was impressed by the fact that the record showed nothing on the matter and the affidavit about it was detailed. The importance of detail and supporting material has recently been re-affirmed by this Honorable Court's decision in *Fontaine v. United States*, 411 US 213 (1973), dealing with a different context—mental competence. In that case, hospital records were tendered in support of Fontaine's claims and showed hospitalization a month following his plea for heroin addiction, and other severe injury and illness. Once again, this Honorable Court held that the 28 USC §2255 standard of conclusiveness was not met when this material was compared with the evidence taken at the Rule 11 plea proceeding (not set out in the opinion). This differs from the ordinary case such as Allison's and this difference has been impressively stated by Judge Clark of the Fifth Circuit, writing for the majority in the *en banc* decision in *Bryan v. United States*, 492 F2d 775 (5 Cir 1974):

> ". . . The record of the plea proceedings in the case at bar reflects that both Bryan and his attorney testified without conflict or equivocation that no plea bargain had been made or promised, directly or indirectly.[3] No such testimony appeared in the files and records developed in Fon-

3. Allison's case differs from Bryan's in that Allison's lawyer evidently made no representations to the court at trial about the absence of promises.

taine and Machibroda. In neither of these cases had petitioner and his attorney been required to testify in open court as to whether a bargain had been struck. In neither case did explicit denials of plea bargains appear as a part of a duly recorded court proceeding record. To the contrary, not only was the subject of plea bargaining entirely absent from Fontaine's record but also those documents disclosed that he did not even have an attorney. The Machibroda record shows that the only person permitted to speak at the time of his sentencing was the attorney from whom knowledge of the alleged plea bargain had assertedly been withheld.

It is one thing to hold that petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of an unraised fact, but the utterly incredible assertion that all former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself.

****

The Supreme Court said that Machibroda was 'not far from the line'. This case is way over it." *Id.* at 780.

Therefore, in light of these precedents, the District Court's disposition was clearly correct.[4]

---

4. In addition to Allison's claim, like Bryan's, having been contradicted, an additional factor weighs against a hearing for him that is not present in *Bryan* or most of the other cases which follow. As Allison was a state prisoner, the standard of conclusiveness was inapplicable to the prior proceeding concerning him, since that standard appears only in 28 USC §2255 dealing with federal prisoners, not in 28 USC §2254, dealing with state prisoners. Therefore, prior proceedings concerning Allison are not gauged with the same stringency as those of Bryan and other federal prisoners.

The District Court's decision is also supported by an analysis of post *Machibroda* authority. The majority of cases show heed paid to the salient facts in *Machibroda* and rulings made accordingly. For example, where an allegation of misrepresentation by counsel or a broken plea bargain by government has been made, and there evidently has been no disclaimer of promises at the time of a plea, a hearing has been directed, *Scott v. United States*, 349 F2d 641 (6 Cir 1965); *Del Piano v. United States*, 362 F2d 931 (3 Cir 1966); *Reed v. United States*, 441 F2d 569 (9 Cir 1971); *Shoultz v. Hocker*, 469 F2d 681 (9 Cir 1971) (state case); *United States v. Battle*, 447 F2d 950 (5 Cir 1971); *Micklus v. United States*, 537 F2d 381 (9 Cir 1976), although the aspect of detail in alleging the episode has not been critically dealt with except in the *Scott* and *Micklus* cases. On the other hand, where a misrepresentation by counsel or a broken plea bargain by government is alleged by one who has previously told the court that he has received no promises for his plea, some cases have held that files and records meet the statutory "conclusive" standard on this account alone, *United States v. Davis*, 319 F2d 482 (6 Cir 1963); *Putnam v. United States*, 337 F2d 313 (10 Cir 1964); *Norman v. United States*, 368 F2d 645 (3 Cir 1966); *Pursley v. United States*, 391 F2d 224 (5 Cir 1968); *Rosado v. United States*, 510 F2d 1098 (5 Cir 1975). Still other cases have reached the same result on the basis of an at-trial disclaimer of promises without employing a form of the statutory term, conclusiveness, *Lynott v. United States*, 360 F2d 586 (3 Cir 1966); *Alvereze v. United States*, 427 F2d 1150 (5 Cir 1970); *Moody v. United States* 497 F2d 359 (7 Cir 1974); *Frank v. United States*, 501 F2d 173 (5 Cir 1974). Yet another group of cases came to this result in partial reliance on other noteworthy factors as well as the disclaimer of promises, *Olive v. United States*, 327 F2d 646 (6 Cir 1964) (failure to use opportunity to speak plus conclusory allegations); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (failure to speak at previous opportunity plus experience in criminal prosecu-

tions); *Earley v. United States*, 381 F2d 715 (9 Cir 1967) (meticulous overall examination on plea plus conclusory allegation); *United States v. Tweedy*, 419 F2d 192 (9 Cir 1969) (failure to mention complaint when writing the judge three letters); *United States v. Frontero*, 452 F2d 406-(5 Cir 1971) (lawyer's statement inconsistent with claim plus conclusory allegation); *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (lawyer's statement inconsistent with claim); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974) (failure to mention the complaints when writing the judge plus delay of two years in complaining); *Crawford v. United States*, 519 F2d 347 (4 Cir 1975) (use of the words "plea bargain" in examining the accused). The decisions in each of last three groups above support the District Court's dismissal and show that its ultimate disposition of the case was proper.

The District Court's approach, as well as its decision is supported by another group of post *Machibroda* precedents—cases like *Machibroda* and *Fontaine* in which a hearing was ordered. In this group of cases, there has been some independent basis for re-examining the plea proceedings beyond the word of the prisoner. In *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974) and *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971) (state case), the record itself showed the incomplete resolution of the conflicts concerning the existence of plea bargaining. In *Hilliard v. Beto*, 465 F2d 829 (5 Cir 1972) (state case), the record showed a substantial reason to lie in that the judge would not accept a bargained plea and Hilliard faced death if his plea were unaccepted. In *Roberts v. United States*, 486 F2d 980 (5 Cir 1973) and *Dugan v. United States*, 521 F2d 231 (5 Cir 1975), the record was supplemented by substantial corroboration in the form of affidavits, some from apparently reliable third parties. Each of the above, like the intended yield of the District Court's efforts, bears some resemblance to one of the bases for re-hearing set out in *Townsend v. Sain*, 372 US 293 (1963). Accordingly, they demonstrate the propriety of the District Court's dismissal in

the absence of some comparable factor in Allison's case.

The Court of Appeals attached significance to an inference from the allegations in this case that Allison's "no promises" statement was part of a cover-up in which he was told to lie to get his plea accepted. Mention of this factor has been made in other cases, *United States v. Tweedy*, 419 F2d 192 (1969); *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Roberts v. United States*, 486 F2d 980 (5 Cir 1973); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *Forrens v. United States*, 504 F2d 65 (9 Cir 1974); *Bass v. United States*, 529 F2d 1374 (4 Cir 1975). However, it adds nothing to the basic contention and should have no significance as the pleading factor. It would be the expected explanation for an allegedly false answer, and the only possible one except for an unreal degree of inattentiveness or reckless disregard. Even with this additional allegation, the claim remains one of either ineffective assistance of counsel or of fundamental unfairness, or both, depending on who supposedly procured the prisoner's perjury; and, like the basic allegation, is belied by the transcript in that it runs counter to the oath. In writing the opinion in *Bryan v. United States*, 492 F2d 775 (1974), Judge Clark pointed out the pitfall involved in using this additional factor as a basis for a hearing:

> "It is one thing to hold that a petitioner facing files and records that are silent on the subject of plea bargaining is entitled to develop a charge that a police official or prosecutor bargained not only for his plea but for concealment of the bargain itself. It is a wholly different thing to say that a district judge must accord a hearing to a petition which advances, not the suppression of a unraised fact, but the utterly incredible assertion that all the former official proceedings in his cause were no more than a stultifying charade in which justice was mocked by every participant—even the judge himself. No proceeding, not a single conceivable one, would enjoy the finality

> that decisional law must have to maintain its credence. Indeed, the number of hearings which a wilful affiant could provoke as to a single conviction would be limitless, for each time he could swear that someone at the last preceding hearing subborned false testimony from him or his lawyer or that the judge played false in the performance of his duties." *Id.* at 780.

Therefore, in light of the above, this additional factor should have no impact as a matter of pleading and does not provide a basis for reversing the District Court's approach in this matter.[5]

This District Court's approach, and the precedents above in accordance with it, are supported by a number of sound reasons. These include the low probability of such claims being truthful; the inability to determine if this is an actionable complaint on the basis of the allegations made by Allison; the possible damage done to the equitable underpinnings of habeas corpus by permitting such claims as this to be made; and the fact that a hearing alone, not freedom, is often the real relief

---

5. Some of the cases in the above paragraph are part of a larger group which do not support the District Court's approach. One subgroup flatly holds that disclaimers or promises are only "evidential — not conclusive", and rely mostly on this view in ordering a remand. *United States ex. rel. McGrath v. LaVallee*, 319 308 (2 Cir 1963) (state case); *Trotter v. United States*, 359 F2d 419 (2 Cir 1966); *Jones v. United States*, 384 F2d 916 (9 Cir 1967); *United States v. McCarthy*, 433 F2d 591 (1 Cir 1970); Other cases evidently assume this proposition but do not articulate it when ordering a remand, *United States v. Simpson*, 436 F2d 162 (DC Cir 1970); *Gallegos v. United States*, 466 F2d 740 (5 Cir 1972); *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1976) (state case); *Mayes v. Pickett*, 537 F2d 1080 (9 Cir 1976); *McAleney v. United States*, 539 F2d 282 (1 Cir 1976). Other cases remand for preliminary action such as a response by the government on the basis of this view without articulating it. *Moorhead v. United States*, 456 F2d 992 (3 Cir 1972); *Walters v. Harris*, 460 F2d 988 (4 Cir 1972); *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974); *United States v. Hawthorne*, 502 F2d 1183 (3 Cir 1974). The District Court properly disregarded such decisions as these.

sought by such petitions. Each standing alone would suffice as a good reason for decision. All together, they make the District Court's resolution a compelling one.

The first reason—low probability of truthfulness—cannot be gainsaid. This is an elementary fact of life in habeas practice because of the low percent of prisoner wins overall. Beyond this generalization, however, the low probability of truthfulness on this particular type claim is demonstrated by the near unanimous recorded reaction of the federal trial judiciary to it, as shown by the decisions previously cited in this brief. In every one dealing with this type of claim, the District Court Judges denied a hearing in the first instance. In some cases, they did not even ask the government to answer. This single stance by the trial judiciary is an impressive reason by itself for this Honorable Court to endorse the District Court's resolution. However, it does not have to stand by itself as a reason for action by this Honorable Court. It is complimented by the fact that those appellate courts which have reversed the District Courts know the same thing to be true. In *Reed v. United States*, 441 F2d 569 (9 Cir 1971), the court opined that the hearing it ordered might well be "an exercise in futility"; in *United States v. Simpson*, 436 F2d 162 (DC Cir 1970), the plea transcript contradicting the claim was described as being of "high significance" in testing the merits of the claim; in *United States v. Valenciano*, 495 F2d 585 (3 Cir 1974), the prisoner was described as facing a "formidable barrier" and a "herculean burden" in this type of case. Even in the Fourth Circuit, Judge Craven who authored *Walters v. Harris*, 460 F2d 988 (4 Cir 1972), which engendered the decision in Allison's case, recently expressed the following thoughts in another context:

> "We think that all but very few lawyers take seriously their obligation as officers of the court and their proper role in the administration of justice. We think the probability of improper counselling, ie, to lie or evade or distort the truth, is negligible in most cases.

> . . . [W]e think that effective improper coaching is not so easily accomplished as some would suppose. Directors of drama spend hours, not minutes, teaching the correct inflection and demeanor to an accomplished actor to achieve a convincing performance. We think the occasional unethical lawyer is not so expert and his client not so adapt in the art of deceit.", *United States v. Allen*, __ F2d (75-1295) (4 Cir 1976).

In light of the uniform stance of the trial judiciary and expressions by the appellate judiciary such as the above, the District Court's resolution in this case was entirely proper.

The second reason is an especially important one in view of today's crowded federal dockets. Government personnel are not implicated through Allison's personal knowledge and for all that appears, he may asking the Court to penalize the government for perjury and conspiracy in which it played no part. If this developed as the case, it would be questionable whether his complaint would be actionable due to the minimal state action involved (maintaining the conviction through denial of a post-conviction remedy). Along these lines, one court has recently remarked that "[i]t is a strange legal concept which permits a convict to escape the consequences of his sentence by alleging any legal conspiracy between himself and his lawyer, which brazenly contradicts the solemn and commemorative record made by the judge, counsel and the convict at the Rule 11 hearing", *Mayes v. Pickett*, 537 F2d 1080, 1083 (9 Cir 1976). Therefore, in view of the absence of causitive state action, and the additional facts that guilt or innocence is not ordinarily involved in this type of claim and the prisoner has other recourse against his lawyer, a doctrine of non-review might well be applied to this type of claim. Transferring these factors to the pleading stage, the higher threshhold requirement aids the court in making the determination on this before it commits trial time to it. If it decides to deny relief, a savings is obtained by not having a hearing. Therefore, this factor strongly supports the District Court's resolution.

The third reason is an alternative to the above. It is the damage done to equitable principles if relief is given despite the absence of government fault. As noted in *Fay v. Noia*, 372 US 391 (1963), the writ is historically governed by these principles, and a new defense analogous to the "clean hands" doctrine—deliberate by-pass of state remedies—was established in that case. Both deliberate by-pass and equitable estoppel are raised by allegations such as Allison's where the state is not authoritatively implicated in the misrepresentation. The former may occur because Allison subverted his own plea proceeding. The latter may occur because he lied to obtain a benefit for himself and this was acted on by the state with the prejudice to it of wasted time and money in the plea proceeding and possible future prejudice upon attempting a belated re-trial of the case. At the least, the presence of what would be defenses in the ordinary case should raise the threshhold for hearings so that the inequity above is not compounded by the expenditure of more trial time on claims sought only to be proved from a different side of the same mouth. The savings here provides some offset to the time and money which may have to be expended where relief is granted, to bring the prisoner and his lawyer to justice on account of their conspiracy. Accordingly, this factor demonstrates the propriety of the District Court action.

The last reason a higher threshhold should be required is the fact that the easy availability of a hearing alone is a sufficient inducement to cause many such writs to be filed. The reason for this is that the ordinary looms large in the scheme of things for men whose daily life is the routine of incarceration and isolation. The things that go with obtaining a hearing such as an extra shower, a chance to change into civilian clothes, an automobile ride, the appearance of new faces, and the absence from the institutional environment, mean way more to a prisoner than they would to the man on the street. Given this situation, the outcome on the merits is frequently secondary as a motive for filing a petition. This has been recognized before—

Price v. Johnson, 334 US 266 (1948); *Machibroda v. United States*, 368 US 487 (1962) (dissent of Mr. Justice Clark)—and it is not just speculation. Already, three circuits have remarked on the volume of this type of petition, *Bryan v. United States*, 492 F2d 775 (5 Cir 1974); *Paradiso v. United States*, 482 F2d 409 (3 Cir 1973); *Moody v. United States*, 497 F2d 359 (7 Cir 1974).[6] Accordingly, this impressive reason also suggests that the result reached by the District Court was the correct one.

CONCLUSION

In *Boykin v. Alabama*, 395 US 238 (1969), this Honorable Court constitutionalized the necessity of an examination of the accused prior to accepting his guilty plea. This was done in hopes that it would create a record "adequate for any review that may later be sought and . . . [to forstall] the spin-off of collateral proceedings" and accordingly, in *Fontaine v. United States*, 411 US 213 (1973), this Honorable Court implied that statements made at the above proceeding ordinarily could not be repudiated. The Court of Appeals' treatment of North Carolina's plea proceeding is wholly inconsistent with both of these cases. Therefore, its reasoning should be corrected and its decision reversed, and this is the relief to which your petitioners believe themselves entitled.

---

6. North Carolina is not in a floodgates situation on this type of claim at this time. However, as noted in the petition for certiorari, its potential exposure is huge. There were 116,000 pleas taken under the form of inquiry condemned by the Fourth Circuit in this case. This covers the period of from 1967 through 1973. In early 1974, a different form was substituted, but older forms were not discarded, but instead used until exhausted. Therefore, an unknown part of the 50,000 plus pleas taken since 1974 are also voidable. Needless to say, the sentences in the worst of the above cases have not been served, and even those that have been served retain continued viability for habeas review purposes in the context of being used for later impeachment, for sentencing purposes and other collateral consequences under such decisions of this Court as *Loper v. Beto*, 405 US 473 (1972); *United States v. Tucker*, 404 US 443 (1972); and *Carafas v. LaVallee*, 391 US 234 (1968).

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Richard N. League
Assistant Attorney General

ATTORNEYS FOR PETITIONERS

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden, *et al.*,

Petitioners,

v.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

C. FRANK GOLDSMITH, JR.
Court-appointed Counsel for Respondent

STORY, HUNTER & GOLDSMITH, P.A.
Post Office Drawer 1330
Marion, North Carolina 28752
Telephone: (704) 652-2844

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden, *et al.*,

Petitioners,

v.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

In respondent's view the question presented by the writ of certiorari in this case should be phrased as follows:

> WHETHER A STATE PRISONER WHO ALLEGES THAT HIS OFF-THE-RECORD PLEA BARGAIN WAS BREACHED BY THE STATE IS ENTITLED TO AN EVIDENTIARY HEARING IN FEDERAL HABEAS CORPUS, WHERE THE ONLY INQUIRY AT TRIAL AS TO THE

EXISTENCE OF ANY PLEA BARGAIN WAS A SINGLE QUESTION AS TO WHETHER ANY "PROMISE OR THREAT" HAD BEEN MADE TO INFLUENCE THE DEFENDANT TO PLEAD GUILTY.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent submits that, in addition to the provisions cited by Petitioners, the following are also applicable to his case:

United States Constitution, article I, section 9, clause 2:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.

North Carolina General Statutes, sections 15A-1021 to -1027 (1973) (reproduced in Appendix "A" to brief, infra).

STATEMENT OF THE CASE

The statement of the facts by Petitioners is correct so far as it goes, but the following facts are also material to an understanding of the issues presented:

The respondent, Allison, was indicted for three offenses: felonious breaking and entering, safe-cracking, and possession of burglary tools (App. 9-10). At the time of the alleged offense and the plea, safecracking was punishable by imprisonment from ten years to life, N.C. Gen. Stat. §14-89.1; the other crimes were punishable by a maximum of ten years' imprisonment.

At his initial arraignment on January 24, 1972, Allison, represented by court-appointed counsel, entered

pleas of not guilty in each case. During a recess, however, he agreed to change his plea upon being informed that his co-defendant had agreed to plead guilty and would be available to testify against him (App. 3). Allison therefore entered a plea of guilty to the charge of attempted safecracking; the record does not reflect the exact disposition of the remaining charges, but presumably they were dismissed since they were referred to in the "Adjudication" portion of the plea transcript (App. 12).

The plea-taking procedure was conducted in accordance with then-applicable North Carolina law, by the Clerk's recording the defendant's oral answers to a series of questions contained in a printed form (see Appendix "B" to brief, infra). Of the thirteen questions, the only ones arguably designed to bring to light any plea arrangement were number eight, relating to the maximum sentence that the offense carried, and number eleven: "Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (guilty) (nolo contendere) in this case?" Respondent's recorded answer to this question was "No" (App. 12).

The reverse of the plea form was headed "Adjudication," and consisted of printed findings of fact with spaces for the clerk to insert the names of the defendant and his attorney, and the offenses with which he was charged and those to which he pled guilty. The trial judge simply signed the form in the space provided after reading the questions to the defendant.

In Allison's case, sentence was not imposed immediately but was delayed until January 27, 1972, when he was sentenced to a prison term of seventeen to twenty-one years (App. 14). The record does not reveal what was said by anyone at the sentencing proceeding. His co-defendant, Dana Eugene Laster, received a

sentence of five to eight years (less than the statutory minimum), according to the allegations of respondent's letter to the district court and Laster's own written statement (App. 24, 30).

Allison did not appeal his conviction (he alleged as one of his grounds for habeas relief that he was not informed of his right to appeal), but instead applied to the state courts under North Carolina post-conviction procedures, alleging that he had been told by his attorney of a plea agreement with the state whereby he would receive the minimum sentence of ten years in return for his plea. Allison's petition was denied by the superior court on November 30, 1972, without a hearing, and the North Carolina Court of Appeals denied *certiorari* in an unpublished order dated January 16, 1973 (para. 16 of habeas corpus petition, p. 8a of Appendix in the court below).

Allison then turned to the federal courts for relief and on February 15, 1973, filed a verified *pro se* (though apparently with some assistance from a prison writ-writer) petition for writ of habeas corpus with the United States District Court. In the petition, Allison alleged that his attorney had represented to him that if he pled guilty, he would receive only the minimum sentence of ten years, which agreement had been approved by the prosecutor and the judge, and that if Allison wanted the plea to be accepted, he would have to answer the court's questions as the attorney instructed. The district court, however, construed the petition to allege only a lawyer's erroneous prediction and summarily dismissed it (App. 15-16). Upon Allison's motion for rehearing, the district judge, apparently recognizing his error, referred the case to a magistrate, who entered an order requiring Allison to submit within thirty days an affidavit of the person who Allison claimed had witnessed the attorney's

promise, and other proof of his allegation. In response, Allison wrote the district judge and requested the court's assistance, saying that Laster, his co-defendant, had a statement but was unable to have it notarized because he was incarcerated at another prison unit. A second letter to the court claimed that Allison's mother had written him saying that Laster's statement has been destroyed by the prison notary, and that Laster had also prepared a statement verifying the destruction of the affidavit, but that Allison had never received the statement. Allison asked the court to "check into this," since it was the only way he had of meeting the magistrate's order, and suggested that personnel at Laster's prison unit were attempting to hinder his efforts to obtain relief (App. 21-22).

The district court clerk then wrote Allison and suggested that he obtain an affidavit from anyone with knowledge that a notarized statement had been destroyed, and that he also submit, in lieu of an affidavit, his co-defendant's handwritten statement of the facts, together with a detailed description of his efforts to have the statement notarized (App. 23). Apparently frustrated in his efforts to comply with the court's requests, Allison wrote the district judge some two months later complaining of the disparity in the sentences meted out at trial, and stating that he had heard Laster was reluctant to make a statement for fear of being penalized in such privileges as parole and work-release. Laster, said Allison, should be brought to court and examined about the matter under oath (App. 24).

Instead, the magistrate recommended that the petition again be dismissed, concluding that Allison has been given "ample opportunity" to support his allegations of an unkept plea bargain, and the court dismissed the action (App. 25-27).

Allison next filed a verified motion for reconsideration, in which he alleged difficulty in obtaining sworn statements from Laster due to the "locations of incarceration" of Laster and to "mail difficulties." However, said Allison, he had finally been able to obtain a statement from his witness, and he attached to the motion a statement, purportedly signed by Laster and witnessed by three other persons, corroborating his contention that his attorney had informed him of a bargain with the judge and the prosecutor for ten years (App. 28-30). The district judge denied the motion and ordered the action closed, noting that instead of an affidavit, Allison had submitted "simply an unnotarized statement by petitioner's co-defendant" (App. 31).

On appeal, the Court of Appeals remanded the case to the district court for an evidentiary hearing into the merits of Allison's claims, holding also that a *pro se* petitioner is not to be put to a greater burden than any other plaintiff to obtain an evidentiary hearing when he has alleged facts which, if proved, would entitle him to relief, and that the magistrate had therefore erred in requiring an affidavit from the prisoner's incarcerated witness before considering his petition for reconsideration on its merits. *Allison v. Blackledge*, 533 F.2d 894 (4th Cir. 1976). Upon the state's petition, a writ of certiorari was granted by this Court to review that decision.

SUMMARY OF ARGUMENT

A state prisoner who alleges in a federal habeas corpus petition that his court-appointed attorney induced his plea of guilty by representing to him that he had secured the agreement of the judge and the prosecutor to a lesser term of imprisonment than the

prisoner actually received is entitled to an opportunity to prove his claim in an evidentiary hearing. The requirement that he be given a hearing is not fulfilled by the trial judge's question at the arraignment itself as to whether any promises or threats had influenced the plea, particularly when the prisoner alleges that he was instructed to answer the question in the negative in order to have his plea accepted by the court. Such formalistic recitations were inherently unreliable prior to the widespread acceptance of court decisions legitimizing plea bargaining and the institution of procedures designed to induce full disclosure of plea arrangements and their incorporation into the record of the proceeding.

Since North Carolina has legislatively remedied the former procedure affected by this appeal, a decision in Allison's favor will not burden the state or damage federal-state relations.

An indigent state prisoner should not be required to submit affidavits from others in support of his sworn petition in order to be entitled to a hearing. Such a rule serves no useful purpose in the ultimate resolution of the dispute and is unfair when applied only to this particular class of litigant.

ARGUMENT

I.

THE HABEAS CORPUS PETITION SUFFICIENTLY STATED A CLAIM FOR RELIEF.

The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its

> pre-eminent role is recognized by the admonition in the Constitution that: 'The Privilege of the Writ of Habeas Corpus shall not be suspended . . . .' . . . The scope and flexibility of the writ – its capacity to reach all manner of illegal detention – its ability to cut through barriers of form and procedural mazes – have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.

Harris v. Nelson, 394 U.S. 286, 290 (1969).

Imprisonment pursuant to a plea of guilty that was induced by the unkept promise of a certain minimum sentence may be collaterally attacked in federal habeas corpus. *Machibroda v. United States*, 368 U.S. 487 (1962); *Santobello v. New York*, 404 U.S. 257 (1971). Relief is granted on the theory that a plea thus induced is deprived of its character of a voluntary admission of guilt, an act of free will. *Machibroda*, supra, 368 U.S. at 493. See generally Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 Am. Crim. L. Rev. 771, 785-90 (1973). The standard as to the voluntariness of guilty pleas has been stated as follows:

> A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by . . . misrepresentation (including unfulfilled or unfulfillable promises) . . . .

Sheldon v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957), quoted with approval in *Brady v. United States*, 397 U.S. 742, 755 (1970).

In *Machibroda* the alleged promise was conveyed to the defendant by an assistant United States Attorney, who claimed to represent the U.S. Attorney and to have secured the trial judge's agreement to the bargain. The Court held that Machibroda was entitled to a hearing on his allegations, as improbable as they were in that particular case. The *Machibroda* rule has not, however, been limited in its application to allegations of promises made by prosecutors, judges, or law enforcement officers. The representation made to a criminal defendant by his attorney that there exists a pre-arranged agreement as to the sentence he will receive in return for his plea of guilty is equally effective in depriving a plea of its character as a voluntary act. Claims of such representations have been held sufficient to raise issues of fact precluding summary dismissal of habeas corpus petitions. See, e.g., *Edwards v. Garrison*, 529 F.2d 1374 (4th Cir. 1975), *cert. denied*, ____ U.S. ____ (1976); *U.S. ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *United States v. Hawthorne*, 502 F.2d 1183 (3d Cir. 1974); *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974); *Roberts v. United States*, 486 F.2d 980 (5th Cir. 1973); *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972) (by implication), *cert. denied*, 409 U.S. 1129 (1973); *Moorhead v. United States*, 456 F.2d 992 (3d Cir. 1972); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (per curiam). But see *Frank v. United States*, 501 F.2d 173 (5th Cir. 1974); *Moody v. United States*, 497 F.2d 359 (7th Cir. 1974); *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974).

Examination of the above-cited cases will reveal that in each the claims raised were similar in substance to the allegations of the petitioner in the instant case. Thus, in *Edwards* the claim was that Edwards was told of a plea bargain for twenty years, rather than the thirty to life he received; in *Ternullo* the petitioner

claimed to have been told by his attorney that the maximum sentence he would receive would be four years (he received fifteen); In *Zekelkeyzula* the allegation was that the prisoner's attorney had represented to him that a "deal" had been made for probation; in *Valenciano* petitioner's attorney supposedly transmitted to him the contents of an agreement with the U.S. Attorney for concurrent sentences with no special parole term to follow; in *Moorhead* the petition alleged that Moorhead had been assured by his attorneys that there was a "proposition" for a suspended sentence or probation; *Hawthorne* involved an attorney's promise for a five-year sentence; in *Roberts*, the prisoner, complaining of his seventy-five year sentence, alleged that his attorney had told him that a bargain had been struck for fifteen years; and in *Walters* the petitioner alleged a bargain made through his attorney with an Assistant U.S. Attorney for a ten-year sentence (he received two concurrent twenty-year terms). In each of the above cases, summary disposition was held inappropriate.

Allison alleged in his petition that his guilty plea "was induced by an unkept promise" (App. 2), and that he was led by his court-appointed counsel, M. Glenn Pickard, to believe that Pickard had "talked the case over with the Solicitor and the Judge, and that if the petitioner would plea [sic] guilty, he would only get a 10 year sentence of penal servitude" (App. 2-3). Elsewhere in his petition Allison referred to the agreement in terms of an "unkept bargain" and a "promise" (App. 3, 4), and claimed to have a witness to the conversation between him and his attorney.

In dismissing Allison's initial application, the district court merely stated the undisputed rule that "[p]redictions of counsel of the duration of a sentence, without more, are not grounds for attacking an otherwise valid plea of guilty. *Swanson v. United States*, 303 F.2d 865

(8th Cir. 1962)" (App. 15). See also *Masciola v. United States*, 469 F.2d 1057 (3d Cir. 1972); *Johnson v. Massey*, 516 F.2d 1001 (5th Cir. 1975) (semble). But Allison's claim was of more than a lawyer's mere prediction based upon his experience in the trial of cases or his asserted familiarity with the sentencing habits of the particular judge involved. Allison alleged a *bargain* between the prosecution and the defense for a specified term of imprisonment in exchange for a plea of guilty, and that the agreement was breached. Such an allegation is easily distinguishable from precedent such as *Masciola*, where "the only claim . . . [was] that counsel inaccurately predicted the sentence." 469 F.2d at 1059. "A fundamental distinction exists between an allegation of counsel's erroneous prediction of sentence as in *Masciola* and an allegation of a bargained sentence as in *Moorhead*." *United States v. Valenciano*, 495 F.2d 585, 588 (3d Cir. 1974).

Petitions of indigent prisoners proceeding *pro se* under the federal habeas corpus statutes are to be construed liberally, so as to do substantial justice. *Holiday v. Johnston*, 313 U.S. 342, 350 (1941) ("A petition for habeas corpus ought not to be scrutinized with technical nicety. Even if it is insufficient in substance it may be amended in the interest of justice."); *Walters v. Harris*, 460 F.2d 988, 991 (4th Cir. 1972). Cf. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (rule applied to prisoner's 42 U.S.C. §1983 complaint).

> We recognize that prisoner complaints often seem annoying and insubstantial, and that the volume of such complaints faced by most district courts would try the patience of Job. Job-like patience, however, should be the judicial benchmark in this area. Technical rigidity in reviewing pleadings must be eschewed, and we must remain extremely

> tolerant of the juristically unlearned as they seek to articulate their belief that they have suffered deprivations of constitutional rights.

Covington v. Cole, 528 F.2d 1365, 1373 (5th Cir. 1976) (Goldberg, J., in context of 42 U.S.C. §1983 action).

Judged by this standard, and construed in light of the above-cited precedent, it is submitted that Allison's petition was sufficient to withstand a summary adverse adjudication.

II.

HAVING STATED A CLAIM FOR RELIEF, RESPONDENT WAS ENTITLED TO AN EVIDENTIARY HEARING TO PROVE THE TRUTH OF HIS ALLEGATION.

The beginning point of analysis in determining whether to grant an evidentiary hearing in habeas corpus must be *Townsend v. Sain*, 372 U.S. 293 (1963). The Court in that case examined the power of federal courts to determine issues of fact arising from applications for relief from state court convictions; by "issues of fact," the Court meant "what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . . .'" 372 U.S. at 309 n.6 (quoting from *Brown v. Allen*, 344 U.S. 443, 506 (1953)). The Court found that such power existed.

The Court then turned to the considerations that may make mandatory the exercise of the power of a federal court to receive evidence:

> The appropriate standard . . . is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. In other words, a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts.

373 U.S. at 312-13. See also *Harris v. Nelson*, 394 U.S. 286, 291 (1969) ("It is now established beyond the reach of reasonable dispute that the federal courts not only may grant evidentiary hearings to applicants, but must do so upon an appropriate showing").

The right to an evidentiary hearing in the situation at bar, *i.e.*, an allegation of a broken plea bargain, was determined to exist in *Machibroda v. United States*, 368 U.S. 487 (1962). There the Court noted that the petition's allegations of fact, which were put in issue by the Government's affidavit in response, related primarily to purported occurrences outside the courtroom, on which the record could cast no light. Nor, said the Court, were the circumstances alleged of a kind that the district judge could resolve by drawing upon his own personal knowledge or recollection. 368 U.S. at 494-95. Despite the lack of eyewitnesses to those occurrences in Machibroda's case, a hearing was required.

The courts of appeals of several circuits have reached the same result, requiring an evidentiary hearing where allegations of plea bargaining raise issues of fact outside the record. See, e.g., *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *Hillard v. Beto*, 494 F.2d 35 (5th Cir. 1974); *United States v. Gonzalez-Hernandez*, 481 F.2d 650 (5th Cir. 1973); *Schoultz v. Hocker*, 469 F.2d 681 (9th Cir. 1972); *Gallegos v. United States*, 466 F.2d 740 (5th Cir. 1972); *Macon v. Craven*, 457 F.2d 343 (9th Cir. 1972); *Moorhead v. United States*, 456 F.2d 992 (3d Cir.

1972); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (per curiam); *United States v. Glass*, 317 F.2d 200 (4th Cir. 1963). See also cases cited in Brief for Petitioners at 18 n.5.

Even where the petitioner's allegations are highly improbable, a hearing has been required, to give him the opportunity to offer supporting proof. Thus in *Del Piano v. United States*, 362 F.2d 931, 933 (3d Cir. 1966), the court held: "No matter how improbable or unbelievable the verified allegations of the motion [to vacate sentence] may seem, the movant cannot be denied a hearing." And in *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974), the court noted the "formidable barrier," in light of the petitioner's answers during the Rule 11 plea inquiry, faced by petitioner in claiming a plea bargain, but nevertheless held him entitled to an opportunity to prove his claims, which were directed to evidentiary matters outside the record. In *Machibroda* itself, the petitioner's claim strained credulity, 368 U.S. at 498-501 (dissenting opinion of Mr. Justice Clark). The majority nevertheless required a hearing.

Cases seeming to hold otherwise can be distinguished. Thus in *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974), the court held that no hearing was required where both the defendant and his attorney had testified "without conflict or equivocation" in a particularly extensive rule 11 examination that no plea bargain had been made or promised, directly or indirectly. The court stated, "No per se rule can be applied, for in the final analysis, the issue becomes one of fact. Its resolution necessarily depends upon what is alleged and what is shown by the documentation of each case." 492 F.2d at 778. Bryan had alleged that the judge in the court below was a party to the bargain. The court noted that "[a]ll of the material issues raised by Bryan

are ones the judge, who was required by section 2255 to hear the motion, could readily resolve by drawing on his own personal knowledge and recollection." *Id.* at 779. Judge Goldberg, joined by five members of the *en banc* court, dissented from the denial of an evidentiary hearing, offering a persuasive comparison of Bryan's allegations to those of Machibroda. *Bryan* was followed in *Frank v. United States*, 501 F.2d 173 (5th Cir. 1974), a case involving similar facts (full rule 11 inquiry, including an express denial as to the existence of any plea bargain).

Moody v. United States, 497 F.2d 359 (7th Cir. 1974), is also distinguishable. In *Moody*, a federal defendant submitted a *pro se* petition for reduction of his sentence some three months after his sentencing; the petition alleged that the plea of guilty had been coerced by defendant's attorney in offering a ninety-day sentence followed by probation, and that the judge was "in on the deal." In a later petition, the defendant claimed the bargain had been for a nine-month sentence. The court of appeals affirmed the district court's order dismissing the petition without a hearing, concluding that Moody had not alleged "the detail required to be alleged" to be entitled to a hearing. No other reasons for the holding were furnished in the court's opinion. *Moody* is distinguishable from the case at bar in that it presented a case where the habeas judge could draw upon his own recollection in passing upon the petitioner's allegations, as could the judge in *Bryan*. The decision does not stand for the proposition that a properly pleaded claim of a broken plea bargain would not require a hearing to determine the truth of the facts alleged.

It is true that *Walker v. Johnston*, 312 U.S. 275 (1941), and *Machibroda*, as well as some of the circuit court decisions, arose out of petitions for relief by federal prisoners under 28 U.S.C. §2255 or its

predecessor, and that the decisions in those cases relied at least in part on the mandatory language of that statute. But numerous other decisions, acting without the explicit statutory guidance of §2255, have, by applying the policy behind the rule, reached the same result in considering petitions by state prisoners. E.g., *United States ex rel. Hill v. Ternullo*, 510 F.2d 844 (2d Cir. 1975); *Hillard v. Beto*, 494 F.2d 35 (5th Cir. 1974) ("[E]ven the most conservative reading of the factual allegations of petitioner's §2254 complaint shows that he is claiming to be the victim of a broken plea bargain, but there has been no factual hearing to determine whether this claim is supported"); *Schoultz v. Hocker*, 469 F.2d 681, 682 (9th Cir. 1972) (petitioner "entitled to evidentiary hearing for the determination of the truth or falsity of the allegation as to the alleged promise"); *Macon v. Craven*, 457 F.2d 342 (9th Cir. 1972) (accord); *Zekelkeyzula v. Patterson*, 373 F.2d 522 (10th Cir. 1967) (accord). And, of course, the plain and direct language of *Townsend*, further implemented by Congress in 28 U.S.C. §2254, provides a clear mandate for a hearing in state prisoner cases.

The reasoning followed in the federal-prisoner cases applies with equal force to petitions by prisoners in state custody; in either case, allegations of the existence of an off-the-record plea bargain and its violation raise issues of fact which cannot be resolved by an examination of the record, or even by submission of affidavits. And if hearings are required in petitions from federal convictions, with the protection of the generally thorough rule 11 inquiry, then a state prisoner, whose plea is usually taken without benefit of so searching an examination as that of the federal practice (as evidenced by the reported decisions), surely ought to be entitled to a hearing on his claim that his plea was coerced. See generally *Davis v. North Carolina*, 313 F.2d 904 (4th Cir. 1962), and cases therein cited.

What the Court in *Kaufman v. United States*, 394 U.S. 217 (1969), said of federal prisoners might be equally applied to state petitioners in habeas corpus:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provisions of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

394 U.S. at 226.

The State, however, apparently conceding that Allison was entitled to some type of hearing on his allegations, argues that the arraignment itself was the "full and fair evidentiary hearing" into the merits of his constitutional claim required by this Court in *Townsend* and by Congress in §2254, and that the printed form offered by the state as the only record of that hearing constitutes the "reliable and adequate written indicia" of such a determination referred to in the statute. This is surely among the strangest of the state's contentions in this case, yet because the state is forced to build its entire argument entirely upon that proposition, it bears closer analysis, if only because of its beguiling simplicity.

Allison alleged he was the victim of a broken plea bargain with the state, the bargain having been relayed to him through the mediation of his counsel, who further instructed him in the manner in which the court's questions were to be answered if the bargain were not to be jeopardized by disclosure in open court. That is the claim which, under *Townsend*, requires a full hearing in some tribunal if adjudication in the

federal district court is to be avoided, and "[t]here cannot even be the semblance of a full and fair hearing unless the state court actually reached and decided the issues of fact tendered by the defendant." *Townsend*, 372 U.S. at 313-14. See *Boyd v. Dutton*, 405 U.S. 1 (1972) (state post-conviction proceeding record held an inadequate development of the material facts in issue; error for federal district court to deny relief without evidentiary hearing); *Lane v. Henderson*, 480 F.2d 544 (5th Cir. 1973) (state evidentiary hearing not "full and fair" where only evidence presented was minutes of plea); *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970) ("meaningful presentation of petitioner's claims" is required); *Anthony v. Fitzharris*, 389 F.2d 657 (9th Cir. 1968) (held, transcript of state-court plea proceedings not a sufficient hearing under §2254 as to claim of involuntariness to entitle it to presumption of correctness).

It is difficult to understand how the judge's questions themselves and his "finding" of voluntariness in a pre-printed form could be considered a "determination after a hearing on the merits" of Allison's claim of an off-the-record agreement; when the formalistic inquiry was made, Allison had not been sentenced and no bargain had yet been broken. Yet the state, in Catch-22 fashion, now urges that the "hearing" can precede the events to be heard. The authority cited at pages 15-16 of petitioners' brief in support of that proposition is easily distinguisable, and the reasons advanced for the adoption of such a harsh rule, examined infra, do not withstand scrutiny.

In any event, even if the plea proceeding itself were considered to be a determination into the merits of Allison's claim, evidenced by reliable indicia, that would not end the matter, since such a determination raises only a presumption of correctness which may be

rebutted by the petitioner; it is not a conclusive adverse adjudication. Further, Congress has provided that the presumption shall not apply if any one of several factors (taken mostly from the opinion in *Townsend*) are present, and at least four of those factors are present in Allison's case: (1) the merits of his claim that his answers were false and were part of the *sub rosa* agreement have never been resolved in any tribunal; (2) the form questions of the plea transcript were not a fact-finding procedure adequate to afford a full and fair hearing, as not one of them inquired expressly into the existence of any plea bargain or expectation of leniency, or indicated that such arrangements could be disclosed without fear of judicial sanction; (3) the "material facts" were not adequately developed at that hearing, for the above reasons and for the additional reason that plea bargains have traditionally been shrouded in secrecy, as will be developed infra; and (4) the mere recital of the questions on the form – which is all that appears on the present record – is not a "full, fair, and adequate hearing" into the claim of a broken plea bargain. 28 U.S.C. §2254(d)(1)-(3), (6). Allison therefore did not bear the burden of showing that any such factual determination was erroneous in order to be entitled to federal consideration of his claim.

Furthermore, disclaimers of plea bargains at arraignment are inherently unreliable:

> At the more formal part of the pleading process, the in-court appearance at which the defendant enters his plea, the parties typically act as if no prior negotiations had occurred. Trial judges, although they are aware that negotiation for pleas is a common practice, routinely ask the defendant whether any promises have been made to him. Notwithstanding the fact that the plea has been the subject of negotiation, the defendant usually

answers in the negative, and the prosecutor and defense counsel seldom indicate to the contrary.

> If the judge, the prosecution, or the defense counsel makes a statement in open court that is contrary to what he has been led to believe, especially as to promises by the prosecutor or his defense counsel, . . . [the defendant] would no more challenge that statement in open court than he would challenge a clergyman's sermon from the pulpit.

Trebach, *The Rationing of Justice* 159-60 (1964). As a result, the negotiation process remains largely invisible, informal, and not subject to any systematic control.

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* 61 (Approved Draft 1968). See also Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 Am. Crim. L. Rev. 771, 775 (1973) and cases cited in n. 28 ("[C]ourts are rarely aware of the existence of a plea bargain").

This fact, readily apparent to even the novice at the criminal bar, has been given judicial recognition many times, as the petitioners concede in their brief at page 17 thereof (while continuing to speak of "procuring perjury" and of "bringing the prisoner and his lawyer to justice on account of their conspiracy," *id.* at 21). In *United States v. Tweedy*, 419 F.2d 192, 193 (9th Cir. 1969), the court noted that "a defendant might solemnly affirm to the court that his plea had not been induced by promises of leniency because he thought that this was all part of the game, and that honest answers would destroy the deal." In *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969), the court proposed full disclosure of plea bargains to end the "courtroom charade in which the judge asks whether a

plea has been induced by any promises, and the defendant replies that it has not, when all the actors realize that quite the contrary is true." In *Walters v. Harris*, 460 F.2d 988, 993 (4th Cir. 1972), the court remarked:

> Examination of the defendant alone will not always bring out into the open a promise that has induced his guilty plea. It is well known that a defendant will sometimes deny the existence of a bargain that has in fact occurred . . . out of fear that a truthful response would jeopardize the bargain.

The court then quoted the statement from Trebach, supra, and held: "The danger that a Rule 11 inquiry will not uncover a plea bargain is sufficient that the defendant's responses alone to a general Rule 11 inquiry cannot be considered conclusive evidence that no bargaining has occurred." 460 F.2d at 993 (citing supporting authorities). See also *Edwards v. Garrison*, 529 F.2d 1374, 1377 (4th Cir. 1975) ("[T]he unallayed apprehensions of the accused make general inquiries about inducements unreliable in unearthing plea bargains"); *Bryan v. United States*, 492 F.2d 775, 785-86 (5th Cir. 1974) (dissenting opinion of Goldberg, J.); *Hillard v. Beto*, 465 F.2d 829, 832 (5th Cir.), petition for rehearing en banc granted, 465 F.2d 833 (5th Cir. 1972), en banc panel dissolved and case remanded to panel, 494 F.2d 34 (5th Cir.), remanded for evidentiary hearing, 494 F.2d 35 (5th Cir. 1974); *Gallegos v. United States*, 466 F.2d 740, 742 (5th Cir. 1972).

That such formal transcripts are not always conclusive was confirmed by this Court in *Fontaine v. United States*, 411 U.S. 213 (1973). In that case the district court had denied an evidentiary hearing where the petitioner had acknowledged before him at the rule

11 inquiry that his plea was given voluntarily and knowingly, that he understood the nature of the charges and the consequences of the plea, and that he was in fact guilty, but where he had alleged in his §2255 petition that his plea was coerced. The court of appeals affirmed, holding that since the requirements of rule 11 had been met, this collateral attack was *per se* unavailable. This Court reversed and in a per curiam opinion rejected the notion that the record of the inquiry is conclusive as to voluntariness and immune from collateral impeachment:

> The objective of Fed. Rule Crim. Proc. 11, of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.

411 U.S. at 215. See also *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974) (hearing required despite petitioner's "virtually herculean" burden of overcoming his negative answers to extensive plea-bargaining questions); *Roberts v. United States*, 486 F.2d 980 (5th Cir. 1973) (district court not entitled to rely solely on sentencing transcript); *Macon v. Craven*, 457 F.2d 343 (9th Cir. 1972) (district court not entitled to rely on colloquy between sentencing judge and defendant). And in *Edwards v. Garrison*, 529 F.2d 1374, 1377 n. 3 (4th Cir. 1975), the court below held, as it did in Allison's case, that "a state court's determination that a plea accepted after only general inquiry was freely and voluntarily made without evidentiary exploration of a subsequent allegation that there was an unfulfilled plea bargain is not binding on a federal court under *Townsend* . . . ."

Furthermore, the circumstances of Allison's particular case render his *pro forma* denial especially unreliable. The record that the state wants this Court to consider conclusive consists only of "yes" or "no" answers to form questions; it is not a verbatim transcript of what occurred, and one is unable to ascertain, for example, what might have been said by Allison, his attorney, the prosecutor or the court during pauses between questions or at other times in the proceeding. In was, in fact, common practice in North Carolina under the procedure represented by this record for the trial judge, prior to taking the plea, to instruct the attorney to "go over the form" with his client; or, in cases where that was not done or was inadequate to insure the "right" answers, for the attorney to whisper advice to the defendant following the judge's questions, while the judge waited patiently before proceeding to the next question. Lawyers, after all, are exceptionally talented in the art of making subtle distinctions, and many an unlearned defendant has had it convincingly explained to him that a sentencing understanding or agreement is not a "promise or threat" made to "influence" him to plead guilty, or at least that its disclosure is neither contemplated by that question nor desired by the court. The proceeding in this respect was a sham, and for the state now naively to profess shock upon hearing of such lawyer-client "conspiracies" simply ignores the realities of former North Carolina trial practice.

The present state of the record in this case is therefore not wholly inconsistent with the claim that a bargain was struck for Allison's plea; and in fact other factors point to the existence of some arrangement. Allison was charged with three felonies, to which he initially entered pleas of not guilty; yet he was later permitted to enter a plea of guilty to only the offense of attempted safecracking, and the other charges were

apparently dismissed. If the state does not fault him for failing to disclose this fact as a "promise" made to "influence" him to plead guilty, how can it assert that the record conclusively shows that no additional consideration was given for the plea?

The facts in *McCarthy v. United States*, 394 U.S. 459 (1969), are remarkably in point on this issue. There the record, reproduced in Appendix A to the opinion of the Court, reveals that the prosecutor requested the court to ask "whether or not any promises or threats have been made." The colloquy then continued:

> Mr. Sokol [defense counsel]: No, no promises or threats.
>
> The Court: I am going to ask the defendant himself. Have any promises been made to you for entering a plea of guilty?
>
> Defendant McCarthy: No, your Honor.
>
> The Court: Has anybody threatened you that if you didn't enter a plea of guilty something would happen to you?
>
> Defendant McCarthy: I beg your pardon?
>
> The Court: Has anybody threatened you to enter a plea of guilty?
>
> Defendant McCarthy: That's right, of my own volition, your Honor.

394 U.S. at 474.

But the record also reveals that McCarthy's attorney had just moved to withdraw his previously entered plea of not guilty to count two of three counts, whereupon the prosecutor acknowledged that the plea was satisfactory to the government and that the government would move to dismiss counts one and three (which it later did). 394 U.S. at 472. It would strain the credulity of the experienced criminal trial lawyer to suggest that no plea bargaining had occurred and that

the defendant did not fully expect a dismissal of counts one and three in consideration of his plea to count two, even though McCarthy had responded that no "promise" had been made. Yet the petitioners in the present case impliedly urge that he would have been bound by his answer had the government failed to dismiss the other two counts — that he would have been estopped to assert the obvious bargain. The state would foreclose a hearing on such claims, considering them invariably incredible, even though the facts in several such cases establish or strongly imply the existence of off-the-record plea arrangements.

Another such case is *Justice v. Texas*, 522 F.2d 1365 (5th Cir. 1975), where the arraignment record, which the petitioners here would consider conclusive, showed the following colloquy:

> The Court: You are not pleading guilty because of any fear, threats or coercion, any false or delusive hopes of pardon, or any promises made to you.
>
> Justice: No sir.

Yet the district court found, after an evidentiary hearing, that plea bargaining had taken place and that the defendant had not received the benefit of his bargain. The court of appeals affirmed the granting of relief, termining the question-and-answer series a "formalistic recitation," *Gallegos v. United States*, 466 F.2d 740, 742 (5th Cir. 1972), and refusing to make it conclusive of the issue. Would justice have been done if the district court had adopted the position urged by the petitioners and denied Justice an opportunity to prove the truth of his allegations?

In *United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975), the defendant alleged, and the court found, that the plea of guilty was induced by the prosecutor's covert signal to defendant's attorney that the trial judge had indicated his assent to a probationary sentence. The

court, referring to the "pressures for silence" in such situations, held that "any admission that assurances had been given would divulge judicial participation and thereby jeopardize the understanding. We find that under these circumstances Hammerman's denial of any inducement or commitment [to plead guilty] leaves untouched our determination that the assistant prosecutor's misrepresentation induced the plea." 528 F.2d at 331. The court expressly left undecided the question whether Hammerman would have been bound had the judge asked him whether any predictions had been made that the court would impose any particular sentence.

Thus the state's first "reason" for sustaining a discriminatory approach towards claims such as Allison's – their "low probability of truthfulness" (Brief for Petitioners at 19) – is not completely correct. In any event, Allison's claim, which is apparently corroborated by at least one other person, has not been shown to be untruthful in any reliable state court proceeding, and he is entitled to an evidentiary hearing on his federal petition, where the witnesses (including his attorney, whose testimony has not been sought by anyone thus far) can be examined and the truth of the matter ascertained. Certainly the bare record before the Court is not conclusive on that point, and the case illustrates the necessity for "the continuing availability of a mechanism for relief," *Kaufman v. United States*, supra, 394 U.S. at 226.

III.

A DECISION IN ALLISON'S FAVOR WILL BE OF LIMITED PRECEDENTIAL VALUE AND WILL NOT BURDEN THE STATE, SINCE NORTH CAROLINA NOW PROVIDES FOR FULL DISCLOSURE OF PLEA AGREEMENTS AND THEIR INCORPORATION INTO THE RECORD.

This Court in *McCarthy v. United States*, 394 U.S. 459 (1969), recognized that a fuller inquiry of the defendant at the time he enters his plea is more likely to ascertain the voluntariness of his acts than is the alternate remedy, suggested in that case, of shifting the burden of proof to the government at a later post-conviction hearing. In meeting its burden at such a hearing, said the Court, "the Government will undoubtedly rely upon the defendant's statement that he desired to plead guilty and frequently a statement that the plea was not induced by any threats or promises." 394 U.S. at 469. This prima facie case for voluntariness is likely to be treated as irrebuttable, since "[n]o matter how true these allegations may be, rarely, if ever, can a defendant corroborate them in a post-plea voluntariness hearing." *Id.* Instead, the Court held that the remedy would be a fuller inquiry under rule 11 as to the defendant's understanding of the nature of the charge against him – the point, rather than the existence of a plea bargain, which was there in issue.

This general remedy – fuller inquiry at trial in hopes of flushing out potential infirmities that may later be asserted – has found this Court's approval in other contexts as well. See *Boyd v. Dutton*, 405 U.S. 1 (1972) (waiver of counsel); *Boykin v. Alabama*, 395 U.S. 238 (1969) (waiver of trial rights by plea of guilty); *Jackson v. Denno*, 378 U.S. 368 (1964)

(voluntariness of confession); and *Carnley v. Cochran*, 369 U.S. 506 (1962) (waiver of counsel).

It is true, as petitioners argue (Brief for Petitioners at 22), that the record showing required by *Boykin* was intended to forestall the "spin-off of collateral proceedings," 395 U.S. at 243, but the Court also noted that a record adequate for such review can only be made if the trial judge demonstrates the "utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 243-44. Not being a plea-bargain case, it did not attempt to define the extent to which the trial judge must inquire into the possible existence of a plea bargain to forestall later collateral attack.

However, the state of North Carolina and the federal courts of appeals of several circuits have attempted such a delineation, and to the extent that such efforts prove successful in dispelling the pre-*Santobello* reluctance to bring plea agreements into the open and onto the record, claims such as Allison's are bound to decrease in number.

The Fourth Circuit was apparently the first to attempt a solution on the federal level to the problem of post-conviction attacks on guilty pleas on such grounds. The mechanism chosen was an expanded rule 11 inquiry by the district judge, a negative response to which would prevent subsequent litigation:

> I now inquire of the United States Attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the United States Supreme Court has specifically approved plea bargaining and has said it is "an essential component of the administration of justice . . . to be encouraged." You may, therefore, advise me truthfully of any plea negotiation without the slightest fear of incurring disapproval of the court.

Walters v. Harris, 460 F.2d 988, 993 (4th Cir. 1972), cert. denied sub nom. *Wren v. United States*, 409 U.S. 1129 (1973). Subsequently, the Third and Fifth Circuits followed the lead of the Fourth and required a similar expanded rule 11 inquiry. See *Paradiso v. United States*, 482 F.2d 409, 413 (3d Cir. 1973); *Bryan v. United States*, 492 F.2d 775 (5th Cir. 1974). Such an inquiry is also the solution proposed by the American Bar Association in its Standards. See American Bar Association Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty* 6-12 (Approved Draft 1968).

Apparently in voluntary response to the Fourth Circuit's suggestion in *Walters*, the Administrative Office of the Courts of the state of North Carolina in 1974 distributed to all superior court clerks a revised plea-transcript form for negotiated pleas (Appendix C to Brief), in which the following question appeared:

> 8. I now inquire of the district attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the courts have specifically approved plea bargaining and have said that it is an essential component of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea negotiations without the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (nolo contendere) upon conditions?
>
> Answer_____

The form then provided a space in which the conditions could be set forth, and a further question,

"Except for the promises set out above (paragraph 9), have any promises or threats been made to you to induce you to plead (guilty) (nolo contendere) upon these conditions?"

North Carolina's efforts to encourage complete disclosure of plea agreements and to build an adequate record of guilty-plea proceedings did not end with the above administrative action. In 1975 a thorough legislative revision of North Carolina criminal procedure became effective, and Article 58 of the Criminal Procedure Act, codified as N.C. Gen. Stat. §§15A-1021 to -1027 and reproduced in Appendix A to this brief, set forth a definite procedure for the taking of guilty pleas in the superior court (the court of general jurisdiction). Plea bargaining is now specifically legitimized, and the trial judge is required to inquire of the prosecutor, the defense counsel, and the defendant personally whether there were any prior plea discussions, whether they resulted in an agreement, and what the terms of the agreement are. N. C. Gen. Stat. §15A-1022. The judge is required to advise the parties whether he approves the agreement and will dispose of the case accordingly; if he disapproves, he must give the parties an opportunity to renegotiate. N.C. Gen. Stat. §15A-1023. If the agreement is one relating to sentence and the judge at any time indicates his intention to impose a different sentence, the defendant must be informed and is entitled to a continuance of his case as a matter of right. N.C. Gen. Stat. §15A-1024. A verbatim record of the proceedings must be made, and it must include the terms of the agreement and the assent of all parties. N.C. Gen. Stat. §15A-1026.

Based on this statutory authority, North Carolina again revised its transcript of plea form in 1976 (see Appendix D, infra). The new form, applicable to all pleas whether "negotiated" or not, asks simply:

> 11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the Courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval.

Significantly, at the conclusion of all the questions the defendant signs a statement, under oath, that "[n]either my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case."

Had such a procedure existed in North Carolina at the time Allison entered his plea (which was less than two months after the decision in *Santobello*), arguably this case would not now be before this Court; at the least, Allison would find his claim much more difficult to assert. But the very fact that the inquiry has been expanded implies that the former practice and procedure were inadequate to forestall later claims of undisclosed plea bargains. The openness of the new procedure is a salutary development to be encouraged. For the Court now to hold that the former cursory inquiry as to promises or threats was sufficient would be to tell the lawmakers of North Carolina and its court administrators that they had done a useless act. This Court should not yield to the suggestion of the petitioners that it substitute its judgment for that of the North Carolina legislature, which has remedied the problem of its own initiative and has substantially reduced the likelihood of future claims such as Allison's, or at least diminished their credibility if made.

IV.

ALLISON SHOULD NOT HAVE BEEN DENIED AN EVIDENTIARY HEARING FOR HIS FAILURE TO SUBMIT AN AFFIDAVIT FROM AN INCARCERATED CO-DEFENDANT.

As argued above, the surest way to end petitions of this type is to provide for a full and complete disclosure on the record of plea agreements. This disclosure was not sought in the present case, and North Carolina has now corrected the defect in its procedure. But there must always remain a mechanism for relief when the system of intended full disclosure malfunctions – perhaps in a situation where the judge himself is reluctant to have his assent to the agreement revealed in open court and directs counsel in chambers not to disclose all or part of it, or where law enforcement officials seek to preserve the confidentiality of a proposed informant about to enter a negotiated plea. While admittedly many later claims of unenforced plea bargains will ultimately be found to be without merit, only an extreme cynic would contend that all of them are baseless. A hearing on the merits is a small premium for the insurance that constitutional rights will remain protected.

The magistrate in Allison's case, however, attempted to avoid the inconvenience of a hearing by requiring him to submit an affidavit from his co-defendant, who was then serving a sentence in other institutions. "[T]his Court has emphasized, taking into account the office of the writ and the fact that the petitioner, being in custody, is usually handicapped in developing the evidence needed to support in necessary detail the facts alleged in his petition, that a habeas corpus proceeding must not be allowed to founder in a 'procedural

morass.'" *Harris v. Nelson*, 394 U.S. 286, 291-92 (1969). It is submitted that it is singularly inappropriate to place upon an indigent state prisoner, proceeding *pro se*, the burden of procuring the affidavit of another prisoner, upon penalty of having his claims dismissed. In this case, a "procedural morass" was the result.

The magistrate's directive to Allison presumed a willing witness; it required him to perform an act beyond his control as a condition to asserting a facially valid claim of deprivation of constitutional right. It must be remembered that Laster, the witness, was the very man who had changed his plea and agreed to testify against the respondent, inducing him to plead guilty. Further, Laster had, according to Allison and to Laster's own purported statement, received less than the statutory minimum for the offense of which he was convicted, and he may have had some understandable reluctance to "rock the boat." Laster may simply not have been concerned enough with Allison's fate to trouble himself with an affidavit; he may not have known what one was, or how to make it; his ability to receive mail from other inmates may have been restricted; he may have been concerned (as Allison suggested in his letter to the court) that his custodians would resent him for it and would deny him the minor rewards and privileges associated with satisfactory behavior in our penal system (he was asked, after all, to appear before a prison notary to aid another prisoner in a civil action entitled "Allison v. Blackledge, Warden . . . ."

The point is that one cannot assume the easy availability of such supporting material, at least not so certainly as to fashion from it a "threshold requirement," as the petitioners urge. Not all prisoners may have their plea discussions witnessed; and not all witnesses may willingly furnish affidavits, as this case illustrates.

> A rule requiring something other than the petitioner's own affidavit as a prerequisite to going behind the official transcripts has a certain surface attraction. Nothing in the statute commands such a rule and the realities of prison life suggest that a per se rule might unreasonably and unnecessarily restrict access to the §2255 remedy. More important, *Machibroda* seems clearly to allow a hearing on the strength of the petitioner's own affidavit without supporting papers.

Bryan v. United States, 492 F.2d 775, 783 (5th Cir. 1974) (Goldberg, J., dissenting).

What required Allison months of effort, presumably by his family as his liaison with a reluctant co-defendant, could have been obtained by the state Attorney General's office with little more than a telephone call to the co-defendant's prison unit and possibly another to the attorney who represented Allison at trial. The court below was correct in holding that it was error to place this burden on the respondent.

Respondent concedes that the workload of the federal district courts would be diminished if this class of litigants were barred from the courtroom as petitioners suggest in their brief at 19-20, but this Court has consistently rejected claims of administrative convenience as a justification for unconstitutional distinctions between classes of similarly situated persons. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Carrington v. Rash*, 380 U.S. 69 (1965). "[T]he Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

In *Reed*, supra, the Court unanimously rejected reduction of the workload on the probate courts of Idaho as a justification for an otherwise improper

distinction between classes of petitioners. Such a distinction, "merely to accomplish the elimination of hearings on the merits," was found arbitrary. 404 U.S. at 76. Such holdings can always be distinguished, of course, but it would be unseemly for the federal judiciary to justify reduction of its workload at the expense of a class of litigants, while rejecting such reasons when advanced by other agencies of government. This is particularly so when the interests sought to be asserted are fundamental rights guaranteed under the Constitution, rather than mere statutory entitlements to welfare benefits, military allowances, or the right to administer a decedent's estate. "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . ." *Harris*, supra, 394 U.S. at 292.

The state urges that because few prisoners ultimately prevail in their claims (perhaps because of the very judicial hostility it cites), all should be barred from seeking relief – that this Court should establish a "doctrine of non-review" to this class of petitions (Brief for Petitioners at 19-20). It is true that the increasing number of such claims has threatened to produce a judicial insensitivity to habeas corpus petitions, as was recognized by Mr. Justice Powell in his dissenting opinion in *Boyd v. Dutton*, 405 U.S. 1, 8 (1972). But judicial insensitivity to any class of litigant is to be avoided (the point of the dissent), not lauded as the state suggests.

In any event, it is uncertain what benefits would accrue from transfer of the potential for insensitivity from the trial to the appellate stage through establishment of the "higher threshold requirement" proposed by petitioners (Brief for Petitioners at 20), since it is not suggested how the appellate courts could avoid

review of each case to determine whether the threshold has been met and was appropriately required. The expense and inconvenience of appellate litigation is thereby substituted for a simple hearing at the trial level. "The exhumation and resurrection of viable prisoner complaints which have been summarily given final rites and buried by district courts has become a major occupation of this Court." *Covington v. Cole*, 528 F.2d 1365 (5th Cir. 1976) (Goldberg, J., in the context of §1983 complaints). In addition, the appellate courts themselves have recognized in many cases that there are limits to the claims that are considered worthy of a hearing. See, e.g., *Edmonds v. Lewis*, No. 75-2308 ___ F.2d ___ (4th Cir. December 3, 1976); *Clayton v. Estelle*, 541 F.2d 486 (5th Cir. 1976), and cases therein cited; *Crawford v. United States*, 519 F.2d 347 (4th Cir. 1975). In each of these cases, distinguishable from Allison's on their facts, an evidentiary hearing was not required. Cf. also the report of the Director of the Administrative Office of the United States Courts cited in *Wingo v. Wedding*, 418 U.S. 416, 473 n. 20 (1974) (less than five per cent of habeas corpus petitions in 1973 required hearings; of those that did, eighty-eight per cent were completed in one day or less).

Even if affidavits are deemed useful in establishing a higher threshold for habeas petitioners, they are not a substitute for an evidentiary hearing where the ultimate disposition of the case will likely turn on questions of credibility.

> Where an unresolved factual dispute exists, demeanor evidence is a significant factor in adjudging credibility. An questions of credibility, of course, are basic to resolution of conflicts in testimony. To be sure, the state-court record is competent evidence, and either party may choose to rely solely upon the evidence contained in that record,

> but the petitioner, and the State, must be given the opportunity to present other testimonial and documentary evidence relevant to the disputed issues.

Townsend v. Sain, 372 U.S. 293, 322 (1963). See also *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949); *Caputo v. Henderson*, 541 F.2d 979, 984 (2d Cir. 1976); *Coleman v. Wilson*, 401 F.2d 536 (9th Cir. 1968), cert. denied sub nom. *Nelson v. Coleman*, 393 U.S. 1065; (cannot resolve conflict between allegations of petition and former lawyer's affidavit without evidentiary hearing).

In this case, the trier of fact ought at a minimum to hear the testimony of Allison, the co-defendant Laster, Allison's lawyer, and perhaps the prosecuting attorney. Only in the relatively unlikely event that the versions of all of these potential witnesses coincide would summary disposition be appropriate. Affidavits may serve to put factual disputes in clearer focus, but conflicting claims of historical fact cannot thereby be settled. Hopefully no one would be so cynical as to suggest that in every case of conflicting assertions by a prisoner and his former counsel or his prosecutor, the latter ought automatically to be believed and the petitioner disbelieved; yet that is the implication in requiring that each side submit affidavits, on the basis of which the case will be adjudicated. The "insidious suggestion" of "trial by affidavit," *Raines v. United States*, 423 F.2d 526, 533 (4th Cir. 1970) (Sobeloff, J., dissenting), has been rejected in many cases. *Walker v. Johnston*, 312 U.S. 275, 286-87 (1941) ("Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge."); *United States ex rel. Hill v. Ternullo*, 510 F.2d 844, 847 (2d Cir. 1975); *Del Piano v. United States*, 362

F.2d 931, 933 (3d Cir. 1966) ("The factual issue may not be determined solely on the counter-affidavits submitted by the Government and in total disregard of the movant's affidavit.")

In closing, respondent will briefly reply to some of the petitioners' remaining assertions. The first is their suggestion that damage will be done to "equitable principles" if relief is granted in a situation where the state is not "at fault." (Brief for Petitioners at 21). Aside from the damage done if valid claims of unconstitutional detention are not heard on their merits, the respondent submits that it is inappropriate to discuss the issue in terms of an analysis of relative fault. The question in each case is whether an admission of guilt predicated upon an unfulfilled expectation of leniency is voluntary and fair. The petitioners have simply misunderstood the proper function of the state in administering criminal justice.

Petitioners also bring forward in passing another argument more vigorously advanced below, deliberate by-pass of state remedies (Brief for Petitioners at 21). The state, however, admitted in its answer to Allison's petition that he had exhausted his state remedies, and in any event the doctrine applies only to the failure to exhaust remedies that are still open to the habeas applicant at the time he files his application in federal court. *Fay v. Noia*, 372 U.S. 391, 435 (1963). The "remedy" that Allison by-passed, according to the state, was that of volunteering to the judge, possibly contrary to his counsel's instructions, his expectation of a ten-year sentence (and for all the record shows, he might have done so, since nothing is known about what he said at sentencing). This failure is hardly the "intentional relinquishment or abandonment of a known right or privilege" established by *Fay* as the controlling standard. Further, there has been no hearing

in federal court to find the facts bearing on Allison's alleged default, as *Fay* explicitly requires. 372 U.S. at 439. See also *Humphrey v. Cady*, 405 U.S. 504, 517 (1971).

"Finally, petitioners raise the spectre of wholesale invalidation of the guilty pleas of the worst offenders in North Carolina if Allison's claim is sustained. This concern is not well founded; if those who pleaded guilty prior to 1974 have not yet uttered a word of protest that an alleged bargain was broken, how likely is it now that they will? And if they do, how credible are their assertions likely to be? This is the reason "North Carolina is not in a floodgates situation on this type of claim at this time," Brief for Petitioners at 22 n.6.

CONCLUSION

It has been nearly five years now since Allison first presented to the courts a facially valid claim of unconstitutional treatment, but he has not yet been granted even the opportunity to have the truth of his sworn allegation determined through the testimony of witnesses. The state has offered no sound reason why he should not be granted his day in court, and the court of appeals was correct in holding that he is entitled to this much. Its judgment should not be disturbed.

Respectfully submitted,

C. FRANK GOLDSMITH, JR.

Court-Appointed Counsel for Respondent

Story, Hunter & Goldsmith, P.A.
Post Office Drawer 1330
Marion, North Carolina 28752
Telephone: (704) 652-2844

APPENDIX "A"

NORTH CAROLINA GENERAL STATUTES

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§15A-1021. *Plea conference; improper pressure prohibited; submission of arrangement to judge.*

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the solicitor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the solicitor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

§15A-1022. *Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.*

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

(1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
(2) Determining that he understands the nature of the charge;
(3) Informing him that he has a right to plead not guilty;
(4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
(5) Determining that the defendant, if represented by counsel, is satisfied with his representation; and
(6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.

(b) By inquiring of the solicitor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

(1) A statement of the facts by the solicitor.
(2) A written statement of the defendant.
(3) An examination of the presentence report.
(4) Sworn testimony, which may include reliable hearsay.
(5) A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt.

§15A-1023. *Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.*

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the solicitor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the solicitor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. A decision by the judge disapproving a plea arrangement is not subject to appeal.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the

solicitor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

§15A-1024. *Withdrawal of guilty plea when sentence not in accord with plea arrangement.*

If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

§15A-1025. *Plea discussion and arrangement inadmissible.*

The fact that the defendant or his counsel and the solicitor engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

§15A-1026. *Record of proceedings.*

A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and transcribed. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the solicitor, and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the

assent of the defendant, his counsel, and the solicitor be recorded.

§15A-1027. *Limitation on collateral attack on conviction.*

Noncompliance with the procedures of this Article may not be a basis for review of a conviction after the appeal period for the conviction has expired, unless the review is expressly authorized by S.S. 15-217.

1b

File # _____
Film # _____
In The General Court of Justice
_____ Court Division

STATE OF NORTH CAROLINA
County of_____

STATE OF NORTH CAROLINA

vs.

_____

APPENDIX "B"

TRANSCRIPT OF PLEA

The Defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer:_____
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer:_____
3. Do you understand that you are charged with the (felony) (misdemeanor) of _____ _____ _____? Answer:_____
4. Has the charge been explained to you, and are you ready for trial? Answer:_____
5. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer:_____
6. How do you plead to these charges - Guilty, not Guilty, or nolo contendere? Answer:_____
7. (a) Are you in fact guilty? (Omit if plea is nolo contendere) Answer:_____
   (b) (If applicable) Have you had explained to you and do you understand the meaning of a plea of nolo contendere? Answer:_____
8. Do you understand that upon your plea of (guilty) (nolo contendere) you could be imprisoned for as much as _____ (months) (years)? Answer:_____
9. Have you had time to subpoena witnesses wanted by you? Answer:_____
10. Have you had time to talk and confer with and have you conferred with your lawyer about this case, and are you satisfied with his services? Answer:_____
11. Has the Solicitor, or your lawyer, or any policeman, law officer or anyone else made any promise or threat to you to influence you to plead (guilty) (nolo contendere) in this case? Answer:_____
12. Has anyone violated any of your constitutional rights? Answer:_____
13. Do you now freely, understandingly and voluntarily authorize and instruct your lawyer to enter on your behalf a plea of (guilty) (nolo contendere)? Answer:_____
14. Do you have any questions or any statement to make about what I have just said to you? Answer:_____

I have read or heard read all of the above questions and answers and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct.

_____
Defendant

Sworn to and subscribed before me this_____day of_____, 19___.

_____
Clerk Superior Court

AOC-L Form 158
Rev 10/69

(over)

ADJUDICATION

The undersigned Presiding Judge hereby finds and adjudges:

I. That the defendant, _____, was sworn in open Court and the questions were asked him as set forth in the Transcript of Plea by the undersigned Judge, and the answers given thereto by said defendant are as set forth therein.

II. That this defendant, was represented by attorney, _____, who was (court appointed) (privately employed); and the defendant through his attorney, in open Court, plead (guilty), (nolo contendere) to _____

_____

as charged in the (warrant) (bill of indictment) (the lesser offense), of _____

_____

and in open Court, under oath, further informs the Court that:

1. He is and has been fully advised of his rights and the charges against him;
2. He is and has been fully advised of the maximum punishment for said offense(s) charged, and for the offense(s) to which he pleads (guilty) (nolo contendere);
3. He is guilty of the offense(s) to which he pleads guilty;
4. He authorizes his attorney to enter a plea of (guilty) (nolo contendere) to said charge(s)
5. He has had ample time to confer with his attorney, and to subpoena witnesses desired by him;
6. He is ready for trial;
7. He is satisfied with the counsel and services of his attorney;

And after further examination by the Court, the Court ascertains, determines and adjudges, that the plea of (guilty) (nolo contendere), by the defendant is freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. It is, therefore, ORDERED that his plea of (guilty) (nolo contendere) be entered in the record, and that the Transcript of Plea and Adjudication be filed and recorded.

This_____day of_____, 19___.

_____
Judge Presiding

APPENDIX "C"

STATE OF NORTH CAROLINA
County of _____

File #_____
Film #_____
In The General Court of Justice
_____ Court Division

STATE OF NORTH CAROLINA
vs.
_____

TRANSCRIPT OF NEGOTIATED PLEA

The defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer _____
2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills?
   Answer _____
3. Do you understand that you are charged with the (felony)(misdemeanor) of _____
   _____
   _____? Answer _____
4. Has the charge been explained to you? Answer _____
5. Do you understand that upon your plea of (guilty)(nolo contendere) you could be imprisoned for as much as _____ (months)(years)?
   Answer _____
6. Do you understand that you have the right to plead not guilty and to be tried by a Jury?
   Answer _____
7. Have you had time to talk and confer with and have you conferred with your lawyer about this case and are you satisfied with his services?
   Answer _____
8. I now inquire of the district attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the courts have specifically approved plea bargaining and have said that it is an essential component of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea negotiations without the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (nolo contendere) upon conditions?
   Answer _____
9. Are these the conditions and all of them? _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____
   _____. Answer _____
10. Except for the promises set out above (paragraph 9), have any promises or threats been made to you to induce you to plead (guilty)(nolo contendere) upon these conditions?
    Answer _____
11. Do you now freely, voluntarily and understandingly authorize and instruct your lawyer to enter on your behalf a plea of (guilty)(nolo contendere) upon the conditions above set out?
    Answer _____
12. Do you have any questions or any statement to make at this time about what I have just said to you?
    Answer _____

[OVER]

I have read or heard read all of the questions and answers on the reverse hereof and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct, and the basis for the negotiated plea of (guilty)(nolo contendere) as stated on the reverse hereof is accurate and is the basis upon which I entered this plea of (guilty)(nolo contendere).

_____ _____
Date Defendant

Sworn to and subscribed before me this _____ day of _____, 19___.

_____
Clerk of Superior Court

As attorney for the defendant, _____, I hereby certify that the conditions stated on the reverse hereof (paragraph 9) upon which the defendant's plea of (guilty)(nolo contendere) was entered are correct and they are the conditions agreed to by the defendant and myself as his attorney upon which the defendant's plea of (guilty)(nolo contendere) was entered.

_____ _____
Date Attorney for Defendant

As district attorney for the _____ Judicial District, I hereby certify that the conditions stated on the reverse hereof (paragraph 9) are the conditions agreed to by the defendant and his counsel and myself for the entry of the plea of (guilty)(nolo contendere) by the defendant to the charge in this case.

_____ _____
Date District Attorney

ADJUDICATION

The undersigned Presiding Judge upon examination of the record proper and hearing statement of counsel for the defendant and the district attorney, and upon considering the evidence offered, makes the following findings:

1. That the conditions of the negotiated plea of (guilty)(nolo contendere) are reasonable and the acceptance and approval of the plea of (guilty)(nolo contendere) by the court would be to the best interest of the defendant and society and the administration of justice.

2. That substantial evidence has been produced to support the charge.

3. That the negotiated plea of (guilty)(nolo contendere) was entered into by the defendant after consultation with counsel and with advice of counsel and that he did so freely, voluntarily and with full knowledge of the consequences.

Upon the foregoing findings, the defendant's plea of (guilty)(nolo contendere) is hereby accepted by the Court.

This _____ day of _____, 19_____.

_____
Judge Presiding

STATE OF NORTH CAROLINA File # _____

County of _____ **APPENDIX "D"** File # _____

In The General Court of Justice

State of North Carolina Vs. _____ Court Division

_____

TRANSCRIPT OF PLEA

The defendant, having tendered a plea of _____ and being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand me? Answer _____
2. Do you understand that you have the right to remain silent and that any statement you make may be used against you? Answer _____
3. Are you now under the influence of alcohol, drugs, medicines, pills, or any other intoxicants? Answer _____
4. Have you discussed your case fully with your lawyer and are you satisfied with his services? Answer _____
5. Do you understand that you are pleading (guilty)(no contest) to the felonies of _____ _____ _____? misdemeanors of _____ _____? Answer _____
6. Have the charges been explained to you by your attorney and do you understand the nature of the charges? Answer _____
7. Do you understand that upon your plea you could be imprisoned for a maximum of _____ years _____ months (and that the mandatory minimum sentence is _____)? Answer _____
8. Do you understand that you have the right to plead not guilty and be tried by a jury and be confronted by the witnesses against you, and by this plea you give up these and your other constitutional rights relating to trial by jury? Answer _____
9. Do you now plead (guilty)(no contest)? Answer _____
10. (a) [If applicable] Are you in fact guilty? Answer _____
    (b) [If applicable] Do you understand that upon your plea of no contest you will be treated as guilty whether or not you admit your guilt? Answer _____
11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the Courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval. Answer _____
12. [If applicable] The District Attorney and your counsel have informed the Court that these are all the terms and conditions of your plea: _____

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

(a) Is this correct? Answer _____ (b) Do you accept this arrangement? Answer _____

(Continued on Reverse)

TRANSCRIPT OF PLEA (continued)

13. [Other than what I have just said] has anyone made you any promises or threatened you in any way to cause you to enter this plea? Answer _____

14. Do you enter this plea of your own free will, understanding what you are doing? Answer _____

15. Do you have any questions about what I have just said to you? Answer _____

I am _____ years of age and completed the _____ grade of school.

I have read or have heard read all of these questions and understand them. The answers shown are the ones I gave in open court and they are true and accurate. Neither my lawyer nor anyone else has told me to give false answers in order to have the Court accept my plea in this case. The conditions of the plea as stated on the reverse hereof, if any, are accurate.

_____ _____
Date Defendant

Sworn to and subscribed before me this _____ day of _____, 19 _____.

_____
Clerk of Superior Court

* * * * * * * * * * * * * *

As Attorney for the defendant, _____, I hereby certify that the conditions stated on the reverse hereof, if any, upon which the defendant's plea was entered are correct and they are agreed to by the defendant and myself upon which the defendant's plea was entered. I further certify that I have fully explained to the defendant the nature and elements of the charges to which he is pleading.

_____ _____
Date Attorney for Defendant

As prosecutor for the _____ Judicial District, I hereby certify that the conditions stated on the reverse hereof, if any, are the terms agreed to by the defendant and his counsel and myself for the entry of the plea by the defendant to the charge in this case.

_____ _____
Date Prosecutor

* * * * * * * * * * * * * * * * * * * *

PLEA ADJUDICATION

Upon consideration of the record proper, evidence presented, answers of defendant, and statements of counsel for the defendant and the prosecutor, the undersigned finds:

1. That there is a factual basis for the entry of the plea.

2. That the defendant is satisfied with his counsel.

3. That the plea is the informed choice of the defendant and is made freely, voluntarily, and understandingly.

The defendant's plea is hereby accepted by the Court and is ordered recorded.

This _____ day of _____, 19_____.

_____
Presiding Judge

In The

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,
Petitioners,

V.

GARY DARRELL ALLISON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

RUFUS L. EDMISTEN
Attorney General of North Carolina

RICHARD N. LEAGUE
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7387

COUNSEL FOR PETITIONERS

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

In The

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,

Central Prison, and

STATE OF NORTH CAROLINA,

Petitioners,

V.

GARY DARRELL ALLISON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

STATUTORY PROVISIONS INVOLVED

NORTH CAROLINA:

§14-2. *Punishment of felonies.* — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court.

§14-54. *Breaking or entering buildings generally.* — (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.

§14-55. *Preparation to commit burglary or other housebreaking.* — If any person . . . shall be found having in his possession,

without lawful excuse, any picklock, key, bit, or other implement of housebreaking; . . . such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court.

§14-89.1. *Safecracking and safe robbery.* — Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State pentitentiary.

UNITED STATES:

28 USC 2246 is set out on p. 2 of the Petitioners' Brief.
28 USC 2255 is set out on p. 4 of the Petitioners' Brief.

SUMMARY OF ARGUMENT

A hearing on Allison's claim was properly rejected by the District Court because it was inherently improbable and was refuted by the inquiry at the time of his plea, which inquiry Allison has not shown to be unreliable. The improbability of his claim is demonstrated by the few recorded instances of broken plea bargains and by the disproportionate number of these claims dealing with alleged promises for sentences by persons unable to make good on them, such as District Attorneys and law enforcement officers. The reliability of his inquiry is demonstrated by two facts. First, the attacks on the form of inquiry used in his case are based on information which is both dated and misinterpreted. Second, the attacks on the reliability of Allison's particular inquiry — the absence of a verbatim transcript, the possibility that Allison's lawyer discussed the inquiry with him, an undocumented charge of large scale wrongdoing by the defense bar, and the possibility the charges were dropped — are not strong considerations either generally or in Allison's case.

Allison's argument that the District Courts and the State

will not be burdened by a result in his favor because North Carolina has changed its form of inquiry on plea bargains should be rejected. It is made in disregard of the great number of prior pleas in North Carolina which will be affected, as well as the great number of pleas in four other circuits not honoring this type of claim presently; is based on incorrect assumptions concerning State legislative history; and is both premature and unsubstantiated insofar as it touts North Carolina's new inquiry as a cure-all.

Allison's opposition to the use of affidavits is not based on substantial grounds. The magistrate's assumption that an affidavit could be obtained was warranted at the time his Order was entered, and he wisely did not involve the State's lawyers in getting the affidavit for Allison. Allison's characterization of the use of affidavits as an administrative convenience and a badge of insensitivity is wholly inaccurate and his assertion that their use would swamp the federal appellate division is unwarranted.

ARGUMENT

I

ALLISON'S ARGUMENT THAT HE IS ENTITLED TO A HEARING BECAUSE THE IMPROBABILITY OF HIS OWN CLAIM IS OF NO CONSEQUENCE AND THE PRIOR STATE HEARING WAS UNRELIABLE ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison argues that he is entitled to an evidentiary hearing because the improbability of his claim is of no consequence and because the State's proceeding was unreliable. This is incorrect.

His assertion that any improbability surrounding his claim should not be a consideration is definitely wrong. It has been mentioned as a consideration in several cases, *Machibroda v. United States*, 368 US 487, 495-496 (1962); *Townsend v. Sain*,

372 US 293, 317 (1963); *Sanders v. United States*, 373 US 1, 21-22 (1963), and because it is a consideration, the improbability of this type of claim should be fully realized. It is shown to some extent by the fact Allison has cited only two reported instances where a hearing on this type of claim bore fruit. The State's search has yielded few others.[1] This is a meager yield indeed when all the guilty pleas in all jurisdictions in this country in all the years pre-plea inquiries were required or used are considered (over 116,000 in North Carolina alone before the 1974 change in plea forms). The improbability of the claim is further shown by the fact that the complaint is almost always that a District Attorney did not do that which he had no power to do, e.g. obtain a sentence for a certain term or a suspended sentence. Certainly if a fair number of broken plea bargain claims were true, it would be expected that District Attorneys would be equally attacked for having failed to carry out promises to do what they could do, e.g. reduce charges, dismiss them, or recommend sentences. However, there are few claims of this type.[2] Finally, the improbability of this type claim being true is brought home by *Mosher v. Lavallee*, 491 F2d 1346 (2 Cir 1974) where the District Court had found such a breach. In that case, the Circuit Court said:

"The instant case is the rare one — unique in this

1 *White v. Gaffney*, 435 F2d 1241 (10 Cir 1970); *Johnson v. Beto*, 466 F2d 478 (5 Cir 1972); *United States v. Ewing*, 480 F2d 1141 (5 Cir 1973); *State ex rel Clancey v. Coiner*, 179 S.E.2d 726 (W. Va. 1971); *United States ex rel McCant v. Brierly*, 304 F Supp 561 (ED Pa 1969).

2 Of the forty plus cases cited in the State's leading brief at pp. 15-18, it appears that only four charged an official with not carrying out a promise on which he could deliver: *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (judge failed to give concurrent sentence); *United States v. Frontero*, 452 F2d 406 (5 Cir 1971) (judge failed to give suspended sentence); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (District Attorney failed to nol pros other charges); *McAleney v. United States*, 539 F2d 282 (1 Cir 1976) (District Attorney failed to make sentence recommendation).

> Circuit so far as we know — where [there was] . . . a false statement by defense counsel . . . that a promise had been made . . .", Id. at 1348.

Therefore, in light of the improbability of this type claim, and the fact that the improbability of a claim is a factor to be considered in granting a hearing, the District Court made the proper decision in this case.

Allison also claims that the State Court plea proceeding was not so searching as federal inquiries, and therefore was unreliable in a legal sense because the more searching federal inquiries are subject to collateral attack. However, as pointed out in the State's leading brief, differing statutory requirements dictate a different result as between federal and state review. Moreover, no such general criticism of North Carolina's proceeding can be made. This type of arraignment in North Carolina is a sworn proceeding, has a minimum set format, and historically has covered at least the following: competency at the time of plea; understanding of the charge; understanding of the right to plead not guilty and have a jury trial; a canvass of the reasons which might contribute to the plea; understanding of the punishment possible; ability to prepare a defense; and allocution by the accused. By contrast, FRCrP 11 inquiries have historically been unsworn; have not been required to deal with mental competency at the time of plea or ability to prepare a defense; and have followed no particular format. All of these tend to make it a proceeding which gives more uneven results than are obtained upon a plea in the Courts of the State of North Carolina. Therefore, this argument does not show that North Carolina's procedure has been relatively less reliable than the procedure of the United States District Courts.

Allison further asserts the State proceeding did not decide the issues of fact tendered — a bargain and its cover-up — and that this provides another reason the hearing was unreliable. In this regard, he contends that it is *Catch-22* and difficult to

use the state court findings because they were made before the alleged breach. This ignores the authorization to utilize implied findings of fact, *Townsend v. Sain*, supra, at 314. It is such a finding which defeats Allison's argument, because it is beyond question that a plea bargain, plea arrangement, plea agreement, or whatever else the rose may be called requires a promise from the State in exchange for an act by an accused. As one writer has put it "promises are central to plea bargaining".[3] Therefore, when an accused says there is no promise, then necessarily there is no plea bargain. If there is no plea bargain, then there cannot be the breach of one. Accordingly the State inquiry did reach the issues involved in this case, and is not unreliable for failure to do so.

Allison further attacks the State hearing on the ground that disclaimers of promises are inherently unreliable, cites Trebach, *The Rationing of Justice* (1964), and speaks of judicial recognition of this. Such criticism is found in both law reviews[4] and cases[5] but it has been uncritically passed on from author to author without examination. The sources for this assertion (when any are cited) are four — D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966);

---

3 Carmen L. Gentile, "Fair Bargains and Accurate Pleas", 49 B.U. L. Rev. 514, at 518 (1969).

---

4 Carmen L. Gentile, "Fair Bargains and Accurate Pleas", 49 BU L. Rev. 514, 518 (1969); J. N. Bongiovanni, Jr., "Guilty Plea Negotiations", 7 Duquesne L. Rev. 542, 548 (1969); Kenneth A. Kraus, "Plea Bargaining: A Model Court Rule", 4 U. Mich. J.L. Ref. 487, 489 (1971); S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy", 6 Val. U. L. Rev. 111, 119 (1972); Note: "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", 1970 Washington U. L.Q. 289, 312 (1974); Robert L. Heath, "Plea Bargaining: Justice Off the Record" 9 Washburn L.J. 430, 435 (1970).

---

5 *Walters v. Harris*, 460 F2d 988 (4th Cir. 1972); *Scott v. United States*, 419 F2d 264 (D.C. Cir. 1969); *United States v. Jackson*, 390 F2d 130 (7th Cir. 1968) (dissent); *Harrell v. United States*, 371 F2d 160 (7th Cir. 1967) (dissent).

Task Force Report: The Courts (1967); Remington, et al., *Criminal Justice Administration: Materials and Cases* (1969); and Trebach, *The Rationing of Justice* (1964). Examination of these sources gives much less cause for alarm than appears from the use to which they are put.

Trebach writes with the avowed purpose of showing how rights are violated and how often and his book is a distillation of his experiences in New Jersey in the 1950's. His quoted words come from a final sub-part in the guilty plea chapter entitled "A Few Fateful Words" in which he references such things as police beatings. His observations are undocumented, and in view of his avowed purpose, it is little wonder that he says what he does. However, examples contrary to his assertion that defendants will never speak up in court appear in several reported cases, e.g. *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971); *United States ex rel Culbreath v. Rundle*, 466 F2d 730 (3 Cir 1974); *Paradiso v. United States*, 482 F2d 409 (3 Cir 1973); *United States ex rel McCant v. Brierly*, 304 F Supp 651 (ED Pa. 1969); *People v. Wheeler*, 67 Cal Rptr 246 (1968). Remington states that summary questioning by a court is not likely to disclose the real circumstances underlying a plea "since it is understood as a part of the bargain that the defendant should deny the plea is the result of either threat or promise" (p. 561). This statement is undocumented, although it appears to have been case in Trebach's state, see Note: 1970 Washington U. L. Q. 289, 315 (1970). The Task Force Report contains two relevant sections — a four page subsection of the first chapter entitled "The Negotiated Plea" and an appendix article "Perspectives on Plea Bargaining" by Arnold Eaken. In the first of these, its writers say that the prosecutor and defendant must ordinarily deny promises (p. 9) citing *Shelton v. United States*, 242 F2d 101 (5 Cir 1957) as authority. In the second of these, Eaken expresses concern with a "system that requires the defendant to deny negotiations" (p. 111). He candidly states that he cannot document his comments and describes them as impressions and observations accumulated

during several years of criminal practice (p. 115), apparently as a federal district attorney in New York City in 1960-63. Newman's book is a survey of guilty pleas procedures in three mid-western states — Wisconsin, Michigan and Kansas — in 1956 and 1957. He states only that in no observed instances "did a general question on promises elicit that a sentence had been promised by a prosecutor" (p. 50). His methodology is not set out but, in any event, his observation is unremarkable because the prosecutor ordinarily would not be expected to promise a sentence.

Several salient facts stand out from the above. The first is that these opinions are dated ones, some reaching back twenty years. The second is that the criticism of the no-promises inquiry is based on only one look into its yield, and the information there reported was unremarkable.[6] The last is that these opinions are based on the fact that large scale plea-bargaining existed in some jurisdictions where it was prohibited and therefore denial was required. However, Allison has pointed to no such prohibition in North Carolina, nor has the undersigned found any; and in any event, there was no prohibition at the time of Allison's plea. Therefore, the general criticism of this type of format has little, if any, applicability to North Carolina pleas in general and Allison's plea in particular.

Finally, criticism of plea proceedings is not persuasive when it is consistered that this Honorable Court probably rejected similiar criticism in coming to its decision in *Boykin v. Alabama*, 395 U.S. 238 (1969). In that case, the court viewed the inquiry by a neutral judge, the open-court atmosphere, the probability of the Judge's good faith, and his independent ability to determine credibility to be sufficient for a reliable

---

6 The authors of "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", 1970 Washington U. L.Q. 289, (1970) surveyed thirty-five pleas in the St. Louis area as a part of their research and stated that in each case the defendant stated that no promises had been made. This seems to be the only subsequent follow-up on this matter.

determination in the normal case. For this additional reason, the criticisms previously mentioned ought not control the court's decision in this case.

Allison also argues that the hearing was unreliable in this case because there might have been more to the proceeding than meets the eye and a verbatim transcript is not before the Court. However, it can reasonably be assumed that had any plea bargaining or sentence representation been mentioned in court and had Allison been unhappy with the result, he would have complained then for the matter would have been out in the open and there would have been no reason to remain quiet; and that he would have mentioned this in his writ, which he has not. Therefore, the absence of the verbatim transcript creates no infirmity in accepting the form transcript in this case.

Allison also asserts unreliability because there "was" a common practice in North Carolina for lawyers to go over the form transcript with their clients, for judges to suggest this, and for judges to sometimes wait for the advice to be given by the lawyer to the client with regard to particular questions. The State also has seen some transcripts which contain this, but presumes it still goes on. It is no more sinister than the trial preparation of any other witness; is perfectly valid; and, in fact, would be the expected. Therefore, it is a far jump from this fact to the implied proposition that the answers given are necessarily false or likely to be so. No such conclusion can reasonably be drawn unless it is assumed that a gigantic tripartite conspiracy exists to falsify court records. The State contends this is not a substantial likelihood and, accordingly, the proceeding is not unreliable because of the above assertion by Allison.

In the same vein, Allison also asserts unreliability because the state's criminal lawyers allegedly have exceptional talent and capacity for guile. He complains that many an unlearned defendant has been convinced by them that a plea bargain is

not a promise or the court does not mean a plea bargain when it says a promise. He continues by charging that the whole affair is a sham. However, like most assertions of this type, it is undocumented. Against Allison's jaundiced opinion of the state's defense bar, the State will match the more longstanding opinion of Judge Craven as set out at p. 19-20 of its leading brief, in which the Judge generally spoke well of the bar in the five states comprising the Fourth Circuit. Therefore, this argument by Allison does not indicate any unreliability in the State's plea proceeding.

Allison further asserts the State cannot claim the record in the case conclusively shows no consideration was given for the plea because two charges against him were dismissed. This is true. However, the conclusive standard applies to attacks on federal convictions under 28 USC 2255, and the question is the reliability of the proceeding in terms of the charge made against it, i.e. a bargain for a particular sentence, not its reliability in terms of every hypothetical line of attack. Although the State cannot vouch that the District Attorney did not drop two other charges as an accommodation either to Allison or his lawyer, their dismissal is consistent with the absence of any plea bargain. Charges are usually dropped as a part of a plea bargain when they have a parity with the undropped charges. This is because the defense gets a substantial benefit in exchange for its plea, and the State gets the benefits of a plea — a sure conviction and a fast trial. However, in this case, since the plea was to attempted safecracking, it is fairly obvious that the State had a sure conviction in any event for that was the highest offense in terms of punishment. In 1972, it carried a penalty of from ten years to life imprisonment, G.S. 14-89.1, while the two companion charges each carried ten year maximum penalties, G.S. 14-54, G.S. 14-55, G.S. 14-52. In light of this disparity, there was no substantial prosecution purpose in obtaining a plea on the two remaining charges. Also there was no substantial defense purpose in obtaining a dismissal of them. This is because if the trial judge were of a mind to throw the book at Allison, he could do no more in 1972 as a practical matter than to give him life imprisonment.[7] On the other hand, if the trial judge were of a mind to be lenient, arraignment on all counts would yield nothing but concurrent sentences or a consolidated one. Therefore, this absence of a real benefit to Allison, plus his failure to note it either at the time of his plea or in his writ strongly suggests that the dropping of the two charges was not pursuant to a plea bargain. Instead, the guilty plea here is way more likely to have exemplified what Eaken described in his article as a "tacit bargain [where] there are no formal explicit negotiations between the defense and the prosecutor. Defendant, aware of an established practice in the court to show leniency to defendants who plead guilty, pleads guilty to the charges in the expectation that he will be so treated" (p. 111). This is referred to by Newman as an "implicit bargain" (p. 60) and is the other side of the coin of "the most common form of plea bargain [which] involves no promises by the prosecutor at all. The county attorney merely lets the defendant or his attorney know that if the case goes to trial, he will 'throw the book' at the defendant and push for the most severe sentence possible."[8] Viewed from these perspectives, the dismissal of two charges does not undermine the reliability of the State court determination in this case.

In light of the foregoing arguments, the State again contends that the District Court's decision was proper due to the improbability of petitioner's claim, and the reliability of the State court proceeding refunding it; and its decision should be endorsed.

---

7 Parole consequences would be different today and would provide a stronger basis for a plea bargain in this context. However, in 1972, a life termer was reviewed for parole at the end of ten years, and that was also the maximum waiting period for review for any term of years as well.

---

8 Shelton C. Williams "Discretion Exercised by Montana County Attorneys in Criminal Prosecutions", 28 Mont. L. Rev. 41, 52 (1966).

II

ALLISON'S ARGUMENTS ON THE ABSENCE OF ANY BURDEN BY VIRTUE OF A FAVORABLE DECISION TO HIM AND ON THE EXISTENCE AND MEANING OF STATE LEGISLATTIVE HISTORY ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison next contends that a decision in his favor will not burden District Court or the State because the State has modified its plea taking procedure to expressly advise an accused that plea bargaining may be revealed. This conclusion is speculative.

Allison first asserts that the form change will limit the impact of a favorable decision for him. This is true — it will be limited to the 116,000 pleas taken before February 1974 and some part of the 50,000 plus pleas taken between February 1974 and September 1976, when a single form was used again for taking all pleas, plus whatever number it applies to in the Fifth, Sixth, Seventh and Tenth Circuits. Therefore, this modest limitation should not be accepted as a basis for decision by this Honorable Court.

Allison also urges that if the Court does not decide the case in his favor, it will be telling the law makers of North Carolina and its court administrators that they have done a useless act in changing transcript forms. This is incorrect for each change had, at the least, a temporary usefulness. The first change was in response to the possibility of the Fourth Circuit applying *Walters v. Harris*, 460 F2d 988 (4 Cir 1972) to state proceedings, which it ultimately did in *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1975); and the second was to use more simple words in order to avoid possible complaints by prisoners that they did not understand the *Walters v. Harris, supra* language. Both changes were pushed by the Attorney General's Office and were not the consequence of any legislative mandate. Speaking for the Office, the undersigned would welcome the

news that the action had been unnecessary. Accordingly, Allison's suggestion in this regard should not concern the Court.

Allison also charges that the form change is an acknowledgement that the earlier proceeding was unreliable. This type of argument is often held to be against public policy because it discourages change or other beneficial activity. In any event, it has no force in this context because the change in forms was no more than an acknowledgement that the United States District Courts would have the last say on the validity of pleas and therefore inquiries had to be tailored to what the Fourth Circuit would require those courts to look to. In light of this, Allison's argument in this regard is wide of the mark.

Finally, Allison's assertion that his case will not govern future cases under the different form of inquiry is certainly a premature judgment for two reasons. First, since making the inquiry in *Walters v. Harris, supra*, conclusive, the Fourth Circuit may have backtracked in *Edwards v. Garrison, supra*, in which it apparently held that arraignment statements bind an accused only so long as he fails to state his lawyer did not tell him to lie. Second, Allison does not say why Mr. Trebach's quotable words, the North Carolina defense bar's exceptional talents in the art of subtle distinction, or the fact that a preprinted form is used will not justify a hearing in the future despite the new procedure. If the reason is that plea bargaining is now considered proper, the answer to this is that it has generally been considered proper since the mid-1960's, *Cortez v. United States*, 337 F2d 699 (9 Cir 1964); *Cooper v. Holman*, 356 F2d 82 (5 Cir 1966), if not before; and any doubts on the matter were laid to rest by *Brady v. United States*, 397 US 742 (1970). Therefore, no predictions about the impact of North Carolina's plea change can be reliable at this time.

In light of the above, Allison's claim that no burdens will arise from a decision in his favor is unwarranted, and should not be a basis for decision in this case by this Honorable Court.

III

ALLISON'S MANY ARGUMENTS THAT THE MAGISTRATE'S REQUIREMENT OF AN AFFIDAVIT WAS UNWISE OR UNWARRANTED ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison further contends that the District Court's requirement of an affidavit from him was rightly rejected by the Court of Appeals. This is an important fact in this case because his failure to obtain one casts even further doubt on the validity of his claim. His arguments should be rejected by this Honorable Court as erroneous.

His first error is the charge that the Magistrate required the affidavit in an attempt to avoid a hearing. Although the motivation of the Magistrate has never been expressed to the undersigned, it seems contrary to what Allison says it is. Had the Magistrate been motivated by the desire to avoid a hearing, he could have simply relied on Allison's no-promises statement and the large amount of authority backing it set out in the State's leading brief at pp. 15, 16. Therefore, this imputation of malevolent intent should not be accepted.

His second error is a charge that the Magistrate's requirement of affidavits was unwise because a number of unwarranted assumptions underlay it. These include assumptions that Allison's witness was a willing one, when it was his co-defendant who had received an erroneously low sentence and might not want to make waves; that the witness was concerned enough to go to the trouble and make the affidavit or knew how to make it; that there would be no mail difficulties in getting an affidavit from him at a different camp; that his custodian would not resent it and pressure him because the action was against another warden. This catalog is unconvincing. None of the above were known at the start and to the extent any of them existed, the Magistrate could expect Allison to let him know about them. He, in fact, did so with regard to mail and

notary difficulties (App p. 28, 21, 22). The appearance of the remainder of these suggestions for the first time in this argument demonstrate their after-thought nature and highlights the fact that they were not generally a problem in this case. Therefore, they should not color the Court's decision on this matter.

Another error is Allison's assertion that the State Attorney General's Office should have ordered the prison department to obtain this affidavit for him. This is a frivolous assertion giving the Attorney General's Office representation of the opposing party in such cases; its desire not to assist in either the clogging of the courts or in the procurement of what would most likely be perjured testimony; the prison department's desire to avoid pressure on prisoners unrelated to institutional and correctional goals; the general distaste of everyone for forced testimony; and the assured resulting boomerang were the witness to refuse to give the affidavit or if it were not to meet Allison's expectations. It takes little imagination to hear a charge of tampering with the evidence being made in the latter regard. Therefore, the Magistrate wisely did not attempt to involve the Attorney General on Allison's behalf.

Allison also erroneously describes the use of affidavits as administrative convenience and asks the Court to downgrade it in its decision on this case. Administrative convenience is no more an apt description of what is involved here than it is in any other case where factual allegations have been decided, and there is some limitation on rehearing such as *res judicata* or collateral estoppel. Instead, what is involved is the natural desire for repose and the utilization of the judicial resources of trial time and personnel. Disregard of the finite nature of the last, and the other demands constantly made on them (mostly by those who have not previously sworn under oath in a court proceeding to the opposite of what they now claim) is counter to the spirit of the decision of this Court in *Sanders v. United States*, 373 US 1 (1963), which prohibits successive claims. Moreover, Allison's arguments leave the

impression he is relatively disadvantaged by this approach. This is most certainly not so. The limitations on the use of prior state determinations as a bar to federal habeas corpus actions single out his class for favored treatment. Non-criminal citizens' claims are forever barred after trial on the merits when the short period for discovering new evidence elapses. However, petitioner is under no similar disability and often even under no disability imposed by a statute of limitations. In light of this favored status, it hardly becomes Allison to charge that his claim has been sloughed because of administrative convenience and this Court should not honor such a claim.

Allison further argues that the use of affidavits, where available, to decline review of the claim is insensitive. This is an argument by emotional appeal. Denying a hearing to one who has previously sworn in court to the opposite of what he now says, and who has previously had and foregone a chance to bring out the matter he now desires to bring out, is no more insensitive than considering that against his credibility in a hearing on the merits. If there is insensitivity in a situation such as Allison's case presents, it is in the promiscuous granting of hearings to persons such as he in disregard of the needs of the rest of society to process their claims relating to personal injury, violation of civil rights, and commercial loss somewhat faster than the average huge delays now prevalent. In light of this, insensitivity is not a substantial factor in this case.

Allison also errs in his assertion that if affidavits are allowed or if a higher threshold is required, the taint of insensitivty will touch the appellate division and that additional appellate litigation, expense and inconvenience will be engendered. The first of the above is an offshoot of the same epithetical substitute for argument mentioned in the paragraph above. The second is obviously incorrect for the State's position is that *Townsend v. Sain*, 372 US 293 (1963) dictates the result it seeks. Therefore, it offers no distinct or remarkable view which is likely to spawn more litigation in the future than that case has in the last thirteen years. The same potential for litigation

over it will exist whether or not Allison or the State wins. However, if Allison wins, there will be an increased potential for litigation on the type of factual allegations he makes. As for appellate expense and inconvenience, the large number of habeas cases now appealed would not likely decrease because of the automatic grant of hearings in such cases as this unless it is assumed that a substantial number of prisoners will prevail. That assumption has never been made before and the State does not find that Allison makes it in this case (*cf.* his discussion of the improbability of this type claim). Further, informal appellate proceedings without oral arguments, and sometimes without briefs, are available under appellate rules, and this tends to minimize appellate costs and "inconvenience", if that is an appropriate word to describe the business of appellate review. In light of this, Allison's floodgates argument should have no impact on the decision in this case.

In addition to dealing with affidavits as a preliminary method, Allison also deals with their use on the merits. Affidavits were not so used here because the merits were not reached. Therefore, the State believes the matter is academic and not before the Court at this time. However, Congress has authorized affidavits in the discretion of the courts, 28 USC 2246. Therefore, this matter should be of no concern to the Court in coming to a decision in Allison's appeal.

In light of the foregoing, the District Court's use of affidavits was entirely proper. Therefore, its approach should be endorsed by this Honorable Court.

IV

ALLISON'S RESPONSE TO THE STATE'S ARGUMENTS DEALING WITH RELATIVE FAULT, THE FUNCTION OF THE CRIMINAL JUSTICE SYSTEM, AND THE POSSIBILITY OF INVALIDATION OF PLEAS ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison concludes the last section of his brief with a subsection in response to the State's arguments. It should not influence the Court's decision in this case.

Allison's most serious charge is that society's interest and the relative fault of its representatives are irrelevant to the issues in this case, a stance required of him since he is so grievously at fault. This is most surely wrong. First, he is preceeding in part under the Fourteenth Amendment Due Process Clause, which is a limitation on government, not private, action and on arbitrariness in government action. Neither of these exists in Allison's case if there is no government fault. Second, it is society and its governmental representatives that Allison wants to pick up the tab for his mendacity. Under our system of laws, it would ordinarily be expected that fault on the State would be a prerequisite to this. Because no government fault is shown here but instead Allison caused the situation of which he now complains, his interest should definitely be subordinated to society's. Accordingly, this Honorable Court should consider this factor.

Allison further asserts that an alternative analysis is the proper one — whether or not enforcing the plea is fair to the accused when it is made on an unfulfilled expectation of leniency. However, fairness should not be judged in the vacuum of the accused's desires alone, but instead should be judged in the light of the interests of all the parties to the criminal process. From that expanded view, it is most certainly fair to allot the finite judicial resources of trial time and personnel on a basis which excludes duplicative effort as frequently as it can. Further, it is most certainly fair (and a common theme in law) for a party who has brought about his own situation to be stuck with it. As a consequence of both of these, it is most certainly fair to reject Allison's argument that he really has not had a hearing because he lied at it for his own advantage, thereby causing it to go awry; and it is fair to require him to give a realistic indication of proof of government chicane or error beyond his own facile testimony before rehashing the

matter. Allison's well-written prose should not obscure the real fact basic to decision in this case — that he has already had a hearing on this matter and he subverted it. Therefore, this Court should apply the burdens of *Townsend v. Sain, supra,* to petitioner's claim, rather than singling it out for special favorable treatment.

Allison finally contends that the State has raised the spectre of wholesale invalidation of its pleas. It has not. If that were the State's concern, it could not claim its hearing procedure was adequate or that men such as Allison should not be heard anew. Instead, what the State has raised is the possibility of a large scale challenge, with the concomitant of a hearing on each such claim as required by the Fourth Circuit. Allison's concluding rhetorical questions do not meet this issue. With regard to the likelihood of challenges to pre-1974 convictions (more accurately pre-1976, since that is the date a single form was again instituted), it cannot have been anything but increased by the Fourth Circuit having swept away any natural reticence on a prisoner's part to bring forth such a claim. This Court's endorsement of the Fourth Circuit would certainly be expected to add to this in other sections of the country. In answer to Allison's questions about the credibility of such challenges, acceptance of his view on the effect of improbability on the decision to grant a hearing necessarily tosses this out as a consideration. If these challenges are not likely to be credible, and they are not, then this ought to weigh against a hearing, not in favor of it as Allison argues.

CONCLUSION

For the reasons expressed in its leading brief, and the arguments and observations above, your petitioners again request that the decision of the United State Court of Appeals for the Fourth Circuit in this case be reversed, and this is the relief to which your petitioners believe themselves entitled.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

Richard N. League
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Telephone: (919) 829-7387

ATTORNEYS FOR PETITIONERS